IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1060 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAJJANSING @ RAJU JAGDISHSINH PAWAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1060 of 1997

MR RAJESH M AGRAWAL for Appellant

MS BR GAJJAR, APP for Respondent - STATE OF GUJARAT

CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 13/03/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

1. The appellant [accused No.1] has, by filing this Criminal Appeal under Section 374(2) of Criminal Procedure Code, 1973 [for short "Cr.P.C."] read with Section 36-B of the Narcotic Drugs and Psychotropic Substances Act, 1985 [for the short "N.D.P.S. Act"], challenged the correctness, legality and validity of the judgment Ex.46, rendered by the learned Additional Sessions Judge, Ahmedabad City, City Civil & Sessions Court, Ahmedabad [for short "the learned Judge of the trial Court"], who presided over the Special Court constituted under Section 36 of the N.D.P.S. Act, on 22.09.1997 in Sessions Case No.313 of 1996, by which the appellant has been convicted under Section 235(2) of Cr.P.C. of the offences punishable under Sections 17 and 18 of the N.D.P.S. Act and is sentenced to undergo rigorous imprisonment of 10 years and to pay a fine of Rs.1,000,00/-- and in default of fine to undergo further rigorous imprisonment of one year.

2. The facts leading to this present Criminal Appeal, as per the complaint Ex.29 lodged against the appellant in a nutshell are as follows :-

2.1 On or about 25.09.1996, the complainant Shri P.M.Jadav, Police Inspector, State Narcotic Cell, C.I.D., Crime, Gujarat State, Ahmedabad was present on duty in C.I.D., Crime, Gandhinagar Zone Police Station [for short "Police Station"]. At about 15.45 hours, the complainant received a secret information from the informant to the effect that during the period between 16.00 hours and 17.00 hours on 25.09.1996, one person looking like Marvadi by name Sajjansing Panvar, resident of Chandannagar, Memco, having oval shape face and wearing khakhi coloured pantaloon and coloured printed full sleeved bush-shirt, was about to go from Memco to Kalyan Toll Naka, Naroda, keeping with him one gunny hand bag on which writing "Rentio Tuver Dal" is printed and in that gunny hand bag, he was to carry with him a contraband article named opium. On receipt of such secret information, the complainant made an Entry No.38 in one register. He, immediately, wrote a confidential letter to the Superintendent of Police, State Narcotic Cell, C.I.D. Crime, Gujarat State, Ahmedabad. According to the case of the prosecution, Shri Mohan Za who is a Superior Officer of complainant received that confidential letter on that very day at about 17.30 hours. Simultaneously, he sent one police head constable Shri Maganbhai K. Katara to call two independent persons, who can act as panch witnesses. As soon as two

independent persons came to Narcotic Office, situated at New Mental Compound, Ahmedabad the complainant drew a preliminary panchnama in presence of two independent witnesses - [1] Babubhai Mohanbhai Patani; and [2] Indrajit Nagjibhai Rajput. At that time, other police personnel Police Inspector Shri N.N.Pathan, Police Sub-Inspector Shri Y.K.Chudasama, Police Sub-Inspector Shri A.R. Singh, Police Head Constable Shri M.K.Katara, Police Constable Shri P.V.Parmar and Police Constable Shri D.A. Chavda were also present with Shri Jadav. These police personnel and panch witnesses were appraised of by Shri Jadav about the secret information received by the complainant and he drew a preliminary panchnama in presence of said two independent witnesses during the period from 15.30 hours to 15.45 hours, on 25.09.1996. Thereafter, the complainant, in company of two panch witnesses and other police personnel, by taking with him necessary articles required for packing and sealing the articles, scale and measurement weights etc., left police station for the place of which description was given by the informant in his secret information. They reached to that place, at about 16.05 hours. The complainant, panch witnesses and police personnel took their respective positions surrounding that place, in such a way that no one can easily locate them. As per the case of the prosecution, at about 16.40 hours, one person resembling the description of that person given in a secret information, was found coming from the side of Omkar Mill, towards the four way crossing. The complainant made that person to halt. In presence of panch witnesses and police personnel, it was found that the person was carrying with him one gunny hand bag on which writing "Rentio Tuver Dal" was printed, in his hand. That person was interrogated by the complainant and on asking his name, that person informed that he was Sajjansing alias Raju Jagdishsing Panvar, aged about 22 years, resident of Chandannagar, just adjacent to Premnagar, Memco, Naroda Road, Ahmedabad. That very person is appellant before this Court. The complainant and Police Inspector Shri N.N.Pathan informed the appellant that they were gazetted officers. The complainant also identified the panch witnesses to the appellant. The complainant informed the appellant that the police had an information that he [appellant] was about to pass on that road by carrying opium with him [appellant] and, therefore, he [appellant] was required to be searched. The complainant also informed the appellant that they could manage to call Gazetted Officer or Magistrate, if the appellant wanted to keep such officer present at the time of search. For giving such type of information, one writing was also given to the appellant. Thereupon, the appellant

informed the complainant that he did not want to call any other officer and that police and panch witnesses could take his search. Thereafter, a gunny hand bag, which was in the hand of the appellant was examined. A writing of "Rentio Tuver Dal" printed both in Gujarati and English was there on the bag. There was one printed emblem of "Rentio" on the bag. The complainant, thereafter, searched that gunny hand bag, which was with the appellant, in his hand, in presence of panch witnesses and other police personnel. On that gunny hand bag being searched, it was found that there were two plastic boxes containing certain weighty object in that plastic boxes. The lids of that two plastic boxes were opened and it was found that both the plastic boxes were filled-in with brown thick semi liquid substance. It was found that the said substance was nothing but thick opium juice. First plastic box, which was closed with brown coloured lid was weighed with the help of weighing scale by the police constable Shri D.A. Chavda. It was found that that plastic box along with the opium was weighing 950 grams. That plastic box was given Mark A. Thereafter, another plastic box was weighed together with substance in it and it was found that it was weighing 800 grams. That second plastic box was given Mark - B. Thereafter, the sample of 50 grams of opium was taken from each plastic box and that two samples each of 50 grams of opium was taken in a separate plastic bag. A sample, which was taken from plastic box Mark-A, was given Mark A/1. Likewise, sample taken from plastic box Mark-B was given Mark B/1. Simultaneously, one another sample of 50 grams of opium was taken in plastic bag from each plastic box and that another sample was taken as a Reserve Sample. Each such sample was placed in one small plastic box, with a label of Babul Jarda 135 and that samples were duly closed, properly packed and sealed by putting a paper slip containing signatures of panch witnesses, as per the prescribed procedure. It is the case of the prosecution that each such packed sample article was sealed by putting a seal of Police Inspector, N.D.P.S., G.S., C.I.D., Crime, Ahmedabad. It is the case of the prosecution that in all 1 kilogram and 750 grams of opium of value of Rs.43,000/-- [Rupees Forty Three Thousand Only] was found from actual conscious physical possession of the appellant. All that articles were seized under a panchnama in the presence of panch witnesses. It is the case of the prosecution that at the time of search of person of the accused, the currency of Rs.17/-- was also found from the appellant. It is the case of the prosecution that this recovery panchnama was drawn below a preliminary panchnama drawn earlier during the period from 15.45 hours to 17.45 hours. The appellant was

arrested at about 17.45 hours on that very day.

2.2 Thereafter, the complainant, by taking with him all the muddamal articles and the custody of the appellant went to the police station and lodged his complaint, at about 19.20 hours on 25.09.1996. That complaint came to be registered as C.R.No.II-11/96. On registering that complaint, the offence stated in the complaint was further investigated by the police. During the course of investigation, it was found that one Laherilal Roshanlal had aided and abetted the present appellant in committing the offence of possessing and carrying the contraband article - opium with him. The muddamal articles along with forwarding letter were sent to Forensic Science Laboratory, Ahmedabad [for short "F.S.L."]. On completion of police investigation, the complainant, who was also an investigating officer filed the charge-sheet against the two accused, one present appellant and another Laherilal Roshanlal. That charge-sheet came to be registered as Sessions Case No.313 of 1996 in the Special Court constituted under Section 36 of the N.D.P.S. Act.

3. On the basis of the material on record, the learned Judge of the trial Court framed a charge at Ex.1 on 24.02.1997. On recording a plea of the accused, both the accused have pleaded not guilty to the charge and they claimed to be tried. To prove the guilt of the accused, the prosecution examined following in all five prosecution witnesses.

[1] P.W.1 Babubhai Mohanbhai Patani, [panch witness No.1] Ex.13
[2] P.W.2 Police Constable, Shri Dilipkumar Alabhai Chavda Ex.14
[3] P.W.3 Police Constable, Shri Kisanrao Laxmanrao, [who carried the samples together with forwarding letter and deposited them in the office of F.S.L.] Ex.17
[4] P.W.4 Indrajit Nagjibhai Rajput [panch witness No.2] Ex.21
[5] P.W.5 Police Inspector, Shri Prakash Mahendrabhai [Complainant] Ex.22

4. The prosecution has also produced and proved certain documents in support of the case for which charge has been framed against the accused. The prosecution has placed heavy reliance mainly on following documents.

1. Forwarding letter with which three

articles/samples were sent to F.S.L. Ex.18

2. Receipt issued by the Officer of F.S.L., for having received sealed and intact two boxes.Ex.19
3. Letter with which report of F.S.L. was sent to the Police Inspector of Anti Narcotic Squad, C.I.D. Crime, Gujarat State, Ahmedabad. Ex.20
4. Entry No.38 dated 25.09.1996 [15.45 hours] from page No.7, of Information Register. Ex.23
5. Office copy of confidential letter of the complainant addressed to his immediate Superior Officer with regard to secret information. Ex.24
6. Panchnama. Ex.25
7. A written information given to the appellant for making compliance of Section 50 of the N.D.P.S. Act. Ex.26
8. Seizure memo signed by the appellant for articles having recovered and seized from him. Ex.27
9. A written information giving reasons for his arrest signed by the appellant. Ex.28
10. Original complaint. Ex.29
11. A report of complainant sent to P.S.O. of Police Station. Ex.30
12. Different paper slips bearing signatures of panch witnesses found from muddamal articles Marks - A, A/1, A/2, B, B/1 and B/2, Ex.31 to 36 respectively.
13. Entry No.2 dated 25.09.1996 [19.20 hours] from page-41 of Station Diary kept and maintained in the Police Station. Ex.37
14. Notification of the State Government declaring areas specified for three Police Stations of Ahmedabad. Ex.38
15. Resolution dated 10.12.1993 of the State Government creating a Narcotic Cell in the Police Force. Ex.39
16. Office order dated 19.11.1993, making posting of different police personnel in Narcotic Cell. Ex.40

On recording of evidence of prosecution was over, the Presiding Judge of the trial Court brought to the notice of and explained to each accused, the circumstances appearing against him in evidence of prosecution witnesses. The appellant has taken a defence of total denial of the case. Still, however, he has submitted his written reply (statement) Ex.42. The defence of accused No.2 i.e. Laherilal Roshanlal is also of complete denial of the case. Thereupon, after hearing the arguments of the learned advocates of both the parties and after scrutinizing, analyzing and appreciating the evidence on record, the learned Judge of

the trial Court came to a conclusion that the case against the appellant for the offences punishable under Sections 17 and 18 of the N.D.P.S. Act was proved beyond reasonable doubt and further that the case against the accused No.2 was not proved beyond reasonable doubt. On the basis of such conclusions, the learned Judge of the trial Court, by rendering her judgment Ex.46 in Sessions Case No.313 of 1996 on 22.09.1997 convicted the appellant [accused No.1] and sentenced him as stated earlier in para-1 of this judgment. The learned Judge of the trial Court by that very judgment, acquitted the accused No.2.

5. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, the original accused No.1 i.e. appellant herein, has preferred this present Criminal Appeal. It be noted that the State Government has not preferred any appeal against the judgment of acquittal rendered in favour of original accused No.2.

6. We have heard Mr.R.M. Agarwal, learned advocate for the appellant and Ms.B.R.Gajjar, learned APP for the respondent i.e. State of Gujarat, in detail at length. Ms. Gajjar has taken us through the entire evidence on record oral as well as documentary. We have perused the record and proceedings of the case called for from the trial Court. We have carefully examined the impugned judgment, also.

7. Mr.R.M.Agarwal, learned advocate for the appellant has assailed the impugned judgment on various counts, which are listed hereinbelow.

[A] The complainant had no authority or power to search, seize and arrest for the offence under the N.D.P.S. Act.

[B] The complainant failed to comply with the requirements of Section 42 of the N.D.P.S. Act. As per the argument of Mr.Agarwal, the complainant has contravened the provisions of Section 42 of the N.D.P.S. Act by not reducing the secret information given to him by the informant, into writing and further by not sending a copy of said information to his immediate Superior Officer, forthwith.

[C] Before searching the gunny hand bag, which was in the hand of the appellant, the complainant contravened the provisions of Section 50 of the N.D.P.S. Act, by not informing the appellant

about existence of his right to be searched before a Gazetted Officer or a Magistrate.

[D] On reading Section 51 of the N.D.P.S. Act read with Section 4 of the Cr.P.C., the complainant has contravened the provisions of Section 102(3) of Cr.P.C.

[E] The complainant has by not forwarding the appellant and articles seized, without unnecessary delay, to the officer in-charge of nearest police station, contravened the provisions of Section 52(3) of the N.D.P.S. Act.

[F] Because the complainant failed to forward the appellant and the muddamal articles to the officer in-charge of the nearest police station, the officer in-charge of the nearest police station could not take the charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized by the complainant and, thereby that officer in-charge of the police station could not affix his seal to such articles with the seal of the in-charge of the police station, and hence, the provisions of Section 55 of the N.D.P.S. Act are contravened by the concerned officers.

[G] The complainant has committed a breach of the provision of Section 57 of the N.D.P.S. Act, by not sending full report of all the particulars of arrest of appellant and seizure of the muddamal articles to his immediate superior officer, within 48 hours, next after such arrest and seizure.

[H] The prosecution has totally failed to prove that article which was allegedly recovered and seized from the appellant, was an opium being a contraband substance under the N.D.P.S. Act.

[I] Both the panch witnesses have not supported the case of the prosecution and, therefore, the prosecution was obliged to declare the said witnesses as hostile witnesses. Thus, the prosecution wants to prove the case against the appellant, by placing reliance on the evidence of police witness only and that the evidence of such police witness does not get any corroboration from the independent witnesses.

[J] The documents which are produced by the prosecution during the trial are not duly proved in accordance with the provisions of Indian Evidence Act and, therefore, that documents cannot be looked into and considered by the Court.

[K] The complainant is an interested witness because he was interested to see that the appellant is convicted and sentenced, any how. The prosecution wants to place a heavy reliance on the evidence of P.W.5 Shri Prakash Mahendrabhai [Ex.22]. He is a Police Officer, who received a secret information, carried out the raid, searched the appellant, recovered and seized the articles under a panchnama, lodged his complaint in the police station, investigated the case from the beginning to end and ultimately, and lastly filed a charge against the appellant. And, therefore, he is most interested witness. His evidence should be discarded.

[L] According to Mr.R.M.Agarwal, P.W.5 Shri Prakash Mahendrabhai [Ex.22] is not a trustworthy and wholly reliable witness, because there are so many contradictions and omissions in his evidence and that his evidence is not consistent with the documentary evidence on record.

[M] Looking to the nature of evidence with regard to journey of samples right from the seizure of that muddamal articles, to sending of that muddamal articles to F.S.L. there was every possibility of samples being tampered with and, therefore, articles which were seized, did not reach to F.S.L. and, therefore, the report on sample received from F.S.L. cannot be said to be a report of sample of article seized.

[N] The appellant cannot be convicted by placing reliance on any evidence for which no question was asked to him during the course of recording his further statement under Section 313 of Cr.P.C.

[O] The learned Judge of the trial Court did not follow the correct procedure, as prescribed under Sections 313, 232 and 233 of Cr.P.C. read with paras 105, 113 and 114 of the High Court Criminal Manual.

[P] The learned Judge of the trial Court did not apply her mind at the time of inflicting sentence. Mr.Agarwal has argued that though the learned Judge of the trial Court, by holding the appellant guilty convicted him for two offences punishable under Sections 17 and 18 of the N.D.P.S. Act, inflicted the sentence of only one set namely rigorous imprisonment of 10 years and to pay a fine of Rs.1,00,000/-- and in default of fine to undergo further rigorous imprisonment of one year. So from the judgment, it is not clear as to for which particular offence, appellant has been sentenced.

8. Mr.R.M.Agarwal, learned advocate for the appellant has vehemently argued that in view of the aforesaid contentions taken by him, the judgment of conviction and sentence is wrong and faulty and against the evidence on record and, therefore, in no case, it can be said that the case against the accused is proved beyond reasonable doubt. He has further argued that looking to contentions taken by him, the judgment of conviction and sentence requires to be quashed and set aside by allowing this appeal. In support of his arguments, he has burdened this judgment by citing relevant, irrelevant, necessary, unnecessary, applicable, inapplicable, on the point and off the point so many authorities duplicating the points he asserted. That authorities are listed hereinbelow.

[1] ALIHUSEN NAJARALI Vs. THE STATE OF GUJARAT, reported in 1974 Cri.L.J. 524;
[2] BOOTA SINGH Vs. STATE OF PUNJAB, reported in 1980 Cri.L.J. 336 [P & H];
[3] SADDA KHAN AND ANOTHER Vs. SULTAN KHAN AND OTHERS, reported in AIR 1920 Lahor 263 (2);
[4] VALSALA Vs. STATE OF KERALA, 1993 Supp. (3) Supreme Court Cases 665;
[5] STATE OF RAJASTHAN Vs. DAULAT RAM, reported in (1980) 3 SCC 303;
[6] GANESH NAIK Vs. THE STATE, reported in 1996 Cri.L.J. 3670 [Orissa];
[7] HARNEK SINGH Vs. STATE OF RAJASTHAN, reported in 1998 Cri.L.J. 299;
[8] BALAJI SAHU Vs. STATE, reported in 1997 Cri.L.J. 2843 [Orrisa] ;
[9] PHOOL KUMAR Vs. STATE (DELHI ADMINISTRATION), reported in 1998 (1) Crimes 54 (Delhi);
[10] LACHHO DEVI Vs. STATE, reported in 1991 Cri.L.J. 2793 [Delhi];
[11] SHOUNATH Vs. STATE OF RAJASTHAN, reported in

1998 Cri.L.J. 169 [Rajasthan];

[12] MAKHAN RAM Vs. STATE OF PUNJAB, reported in 1995 (2) Crimes 716 [P & H];

[13] MEGHA SINGH Vs. STATE OF HARIYANA, reported in AIR 1995 S.C. 2339;

[14] ROY V. D. Vs. STATE OF KERALA, reported in AIR 2001 S.C. 137 [Kerala];

[15] BECKODAN ABDUL RAHIMAN Vs. STATE OF KERALA, reported in 2002 SAR (Criminal) 445;

[16] STATE OF ORISSA Vs. P. SIMANCHAL PATRA, reported in 2002 (4) Crimes 23 (SC);

[17] JOGINDER KUMAR Vs. STATE OF U.P. AND OTHERS, reported in (1994) 4 SCC 260;

[18] Xerox copy of standing instructions published on pages 675 to 678 of book titled Law of Narcotic Drugs and Psychotropic Substances Act, 1985.

[19] MER VEJA MERAMAN Vs. STATE OF GUJARAT, reported in 1988 (2) GLH 515;

[20] ALI Vs. STATE OF KERALA, reported in 2001 (4) Crimes 166 [Kerala];

[21] Xerox copy of relevant paras 103 to 117 from the High Court Criminal Manual 23;

[22] HARIJAN MEGHA JESHA Vs. STATE OF GUJARAT, reported in AIR 1979 S.C. 1566;

[23] IN RE KAMYA, reported in AIR 1960 ANDHRA PRADESH 490;

[24] SAJAN ABRAHAM Vs. STATE OF KERALA, reported in 2001 AIR SCW 2970;

[25] STATE OF PUNJAB Vs. BALBIR SINGH, reported in 1994 (1) CRIMES 753 (SC);

[26] THE STATE OF PUNJAB Vs. BALDEV SINGH ETC., reported in 1999 (3) Crimes 147 (SC);

[27] BABU Vs. STATE OF KERALA, reported in 1999 SAR (Criminal) 780;

[28] KALAYATH NASSAR Vs. STATE OF KERALA, reported in 2000 AIR SCW 271;

[29] VINOD Vs. STATE OF MAHARASHTRA, reported in (2002) 8 SCC 351;

[30] K. MOHANAN Vs. STATE OF KERALA, reported in (2000) 10 SCC 222;

[31] STATE OF HARYANA Vs. SEWA RAM, reported in (2000) 10 SCC 395;

[32] STATE OF HARYANA Vs. VIKRAM SINGH, reported in 2002 SCC (Cri.) 469;

[33] BHERULAL VIRAJI KUMAVAT Vs. STATE OF GUJARAT, reported in 1998 (3) G.L.R. 2497;

[34] ALI MUSTAFFA ABDUL RAHMAN MOOSA, reported in (1994) 6 SCC 569;

[35] SAIYAD MOHD. SAIYAD UMAR SAIYAD AND OTHERS Vs. STATE OF GUJARAT, reported in (1995) 3 SCC 610;

[36] T. P. RAZHAK ALIAS NAGAPPAN RAZHAK Vs. STATE

OF KERALA, reported in 1996 SCC (Cri) 57;

[37] KOLUTTUMOTTIL RAZHAK Vs. STATE OF KERALA, reported in 2000 SCC (Cri) 829;

[38] THANDI RAM Vs. STATE OF HARYANA, reported in JT 1999 (3) SC 231;

[39] GURBAX SINGH Vs. STATE OF HARYANA, reported in AIR 2001 SC 1002;

[40] SHIVABHAI GAJMALBHAI Vs. STATE OF GUJARAT, reported in 1996 (2) G.L.R. 64;

[41] DWARIKESH SUGAR INDUSTRIES LTD. Vs. PREM HEAVY ENGINEERING WORKS (P) LTD. AND ANOTHER, reported in (1997) 6 SCC 450;

[42] P. RAMACHANDRA RAO Vs. STATE OF KARNATAKA, reported in 2002 (2) Crimes 200 (SC);

[43] SUGANTHI SURESH KUMAR Vs. JAGDEESHAN, reported in JT 2002 (1) SC 220;

9. Even by citing aforesaid authorities, Mr.R.M.Agarwal was not satisfied for his submissions at the stage of arguments, but he has further burdened this judgment by citing following authorities in arguments-in-re;

[1] SARJUDAS & ANR. Vs. STATE OF GUJARAT, reported in 2001 (1) GLR 218;

[2] UNION OF INDIA Vs. JASSURAM @ JASRAJ, reported in, 2002 CRIMINAL 953;

[3] BHARATBHAI BHAGWANJIBHAI Vs. STATE OF GUJARAT, reported in 2003 SCR (Cri) 4;

[4] AMRABHAI RANCHHODBHAI BHARWAD Vs. STATE OF GUJARAT, reported in 2001 (2) GLR 1439;

[5] Unreported judgment of this Court [Coram : A. M. Kapadia, J.] dated 01.07.2002 rendered in Criminal Misc. Application No.2989 of 2002 [parties named KABHAIBHAI CHATURBHAI PADHIYAR VS. STATE OF GUJARAT]

[6] Unreported judgment of this Court [Coram : C. K. Buch, J.] dated 18.01.2002, rendered in Criminal Misc. Application No.7323 of 2001 [parties named RANJITSINH DOLATSINH WAGHELA VS. STATE OF GUJARAT]

[7] PANDURANG KALU PATIL & ANR. Vs. STATE OF MAHARASHTRA, reported in 2002 SAR (Cri) 167;

[8] ABDUL RASHID Vs. STATE OF BIHAR, reported in JT 2001 (3) SC 183;

[9] JAMLA HARSING MEDA Vs. STATE OF GUJARAT, reported in 1999 (1) GLR 584;

[10] LAXMAN Vs. STATE OF MAHARASHTRA, reported in 2002 SAR (Cri) 759;

[11] NARAYANASWAMY RAVISHANKAR Vs. ASSTT. DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE, reported in

2003 Crimes 1;

[12] SARJUDAS AND ANOTHER Vs. STATE OF GUJARAT, reported in (1999) 8 S.C.C. 508.

[13] LALESHWAR RAJAK KALANAND DHOBI Vs. STATE OF GUJARAT, reported in (2002) 7 S.C.C. 704.

10. Ms.B.R.Gajjar, learned APP for the respondent i.e. State of Gujarat has supported the impugned judgment throughout. She has argued that the learned Judge of the trial Court has properly considered and appreciated the evidence on record in its correct perspective. She has further argued that the learned Judge of the trial Court has, after placing reliance on evidence on record, came to a right conclusion and she has rightly convicted and sentenced the appellant, who is before this Court. Ms.Gajjar has argued that this case being the case for offences punishable under the provisions of the N.D.P.S. Act, complete and satisfactory evidence is led by the prosecution to show that the complainant being a Police Inspector has strictly followed the different provisions like Sections 41, 42, 43, 50, 52, 55, 57 etc. of the N.D.P.S. Act and looking to the evidence on record, in no case, it can be said that there is a contravention of any of the aforesaid sections. She has further argued that this is a case in which no fault can be found with the complainant or the learned Judge of the trial court. Therefore, she has lastly argued that this appeal deserves to be dismissed by confirming the impugned judgment of the conviction and sentence. Ms.Gajjar has placed reliance on the following authorities :-

[1] ASLAMBHAI IBRAHIMBHAI MEMON AND ANOTHER Vs. THE STATE OF GUJARAT, reported in 1990 Cri. LJ. 1787 [Gujarat] [DB].

[2] SAYAR PURI Vs. STATE OF RAJASTHAN, reported in (1998) 7 SCC 441.

[3] STATE OF PUNJAB Vs. BALDEV SINGH, reported in (1999) 6 SCC 172.

[4] KALEMA TUMBA Vs. STATE OF MAHARASHTRA AND ANOTHER, reported in (1999) 8 SCC 257.

[5] JOSEPH FERNANDEZ Vs. STATE OF GOA, reported in (2000) 1 SCC 707.

[6] JOSEPH FERNANDEZ Vs. STATE OF GOA, reported in AIR 2000 SC 3502.

[7] BIRAKISHORE KAR Vs. STATE OF ORISSA, reported in (2000) 9 SCC 541.

[8] KANHAIYALAL Vs. STATE OF M.P., reported in (2000) 10 SCC 380.

[9] GURBAX SINGH Vs. STATE OF HARYANA, reported in AIR 2001 SC 1002 = (2001) 3 SCC 28.

[10] SAJAN ABRAHAM Vs. STATE OF KERALA, reported in (2001) 6 SCC 692 = AIR 2001 SC 3190.

[11] SURESH GULABSING KUSHVAH AND ANR. Vs. STATE OF GUJARAT, reported in 2002 (1) GLH 146.

[12] NARAYANASWAMY RAVISHANKAR Vs. ASSTT. DIRECTOR, DIRECTORATE OF REVENUE INTELLIGENCE, reported in (2002) 8 SCC 7.

[13] STATE OF HARYANA Vs. VIDHYA DHAR, reported in (2002) 3 SCC 296.

[14] Unreported judgment of Division Bench of this Court [Coram : J.M.Panchal & J.R.Vora, JJ] dated 5/6th February, 2002 rendered in Criminal Appeal No.12 of 2002 [parties named RAGHUBHAI GANDABHAI BHARWAD Vs. STATE OF GUJARAT.]

11. We have dispassionately, considered the rival submissions made for and on behalf of both the parties. We have also carefully gone through the entire evidence, oral as well as documentary, on record. We have scrutinized, re-analysed and re-appreciated the evidence on record, as if this is a trial Court. We have also carefully considered the authorities cited by the learned advocates for both the parties.

12. At the out set, we would like to place on record the fact that both the parties have placed reliance on so many authorities in bulk. There cannot be any dispute regarding the legal position settled in each case. While considering the decisions cited by both the parties, we have kept in mind, the following settled legal position with regard to such type of precedents.

12.1 In case of THE STATE OF PUNJAB Vs. BALDEV SINGH ETC., reported in 1999 (3) CRIMES 147 (SC), on which Mr.R.M.Agarwal has placed reliance, it is held as follows:-

"It is well settled proposition of law that a decision is an authority for what it decides and not that everything said therein constitutes a precedent. The courts are obliged to employ an intelligent technique in the use of precedents bearing it in mind that a decision of the court takes its colour from the questions involved in the case in which it was rendered."

In the aforesaid case, one case of C.I.T. v. Sun Engineering Works (P) Ltd., reported in 1992 (4) SCC 363, has been referred to in para-39.

"It is neither desirable nor permissible

to pick out a word or a sentence from the judgment of this Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."

12.2 In case of PADMASUNDARA RAO (DEAD) AND OTHERS Vs. STATE OF T. N. AND OTHERS, reported in 2002 AIR SCW 1156, a Constitution Bench of the Hon'ble Supreme Court has observed in para-8A as follows :-

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

13. Before we deal with the submissions made by both the parties, we would like to consider the evidence on record. The prosecution has examined two panch witnesses, who were present, when a preliminary panchnama was drawn in the Police Station and they also remained present when the raid was carried out and formality of search and seizure was completed in their presence. First panch Shri Babubhai Mohanbhai [P.W.1] is examined at Ex.13. This witness has half-heartedly supported the case of the prosecution. The prosecution has declared him as hostile witness and he was cross-examined at length by the prosecution as per Section 154 of the Indian Evidence Act. This witness has deposed that at about 2.30 p.m. on 25.09.1996, he was called by one Police and therefore, he went to the Office of C.I.D.

Crime. According to him, a superior officer of that police who had come to call him and others were present in the office, and that superior officer asked him to sign the papers and, therefore, he signed that papers. According to him, he put his signatures at two places. He has further deposed that one signature was put by him in the office and another signature was put by him at Memco Four-Way Crossing. He has further deposed that Officer had informed him that one person, was to be arrested and on saying so his one signature was taken and, thereafter, he returned back. He has further deposed that he did not know as to whether that person was arrested or not. He has further deposed that he stood near Memco Four Way Crossing for about five minutes and he signed the written paper, at that place. In cross-examination, the prosecution put their entire case to him. He has denied that case. He has admitted that panchnama at Mark 12/3 was bearing his signatures. He has also admitted that the seizure memo at Mark 12/5, was also bearing his signature. Thereafter, he was shown different paper-slips taken out from the sealed muddamal articles Marks A, B, A1, A/2 and Marks B/1 and B/2, which were before the trial Court. All these six paper slips were shown to him and he has admitted that all the said paper slips were bearing his signatures, as panch witness No.1. He has admitted that more than two signatures were taken from him. Thus, this panch witness No.1 has admitted the following facts.

[a] On 25.09.1996 at about 2.30 p.m., he was called by the Police and, therefore, he went with police at the office of C.I.D. Crime.

[b] One signature was put on the written paper in the said Office.

[c] Thereafter, he was taken to Memco Four-Way Crossing. He waited there for about five minutes. He put another signature on written paper at that Four Ways Crossing.

[d] He admits that the paper slips taken out from the sealed muddamal articles Marks A, B, A/1, A/2 and B/1, B/2, in the open court were bearing his signatures.

14. Second panch witness Indrajit Nagjibhai Rajput [P.W.4] is examined at Ex.21. This witness has also not supported the prosecution case and hence, he was declared as hostile witness. He was cross-examined at length by the prosecution. In the examination-in-chief, he has

deposed that on 25.09.1996, he was standing near his Tea Hand-cart, which he used to keep opposite to the Office of Narcotic Cell. According to him, one Police Constable came to him and informed him that he was called in the office. According to him, at that time, it was about 5.45 p.m., and that he did not know as to whether other persons were present. He has further deposed that when he went to the office of Narcotic Cell, he was informed that police had arrested one person and, therefore, he had to sign and except this, he was not informed of anything more. In the cross-examination, he admits that he put his signature on the panchnama at Mark 12/3. He has denied the entire case of the prosecution, which was put to him in his cross-examination. He has admitted that he put his signatures at two places in panchnama. He was also shown seizure memo, and on seeing it he admits that it was bearing his signature. He was also shown the paper slips found from the muddamal articles Mark A, B, A/1, A/2 and B/1 and B/2 and on seeing these slips he admits that that slips, are bearing his signatures.

15. Mr.R.M.Agarwal has argued that independent witnesses, who as alleged, were kept at the time of raid, have not supported the case of the prosecution. The contents of panchnama are not duly proved by the prosecution. Mere, the signatures on panchnama, seizure memo and paper slips taken out from the muddamal articles are proved, but by proving mere signatures, it cannot be said that the contents of panchnama are proved and the fact is not proved that the signatures of panch witnesses were put on the paper slips at the Memco Four - Way Crossing. He has emphatically argued that the evidence of panch witnesses cannot be taken into consideration and that evidence should be discarded. It is not a legal position that when panch witnesses are declared as hostile witnesses, their entire evidence should be completely ignored. Ms.B.R.Gajjar, learned APP for the respondent i.e. State of Gujarat has heavily placed reliance on Unreported judgment of this Court [Coram : J.M.Panchal & J.R.Vora, JJ.] dated 5/6th February, 2002 rendered in Criminal Appeal No.12 of 2002. In para-18 of this judgment, this Court has observed as follows :-

> "We further find that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution need not be thrown over board as unreliable. It must be realized that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown

> and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of independent witnesses, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of an accused is concerned. If the evidence of police officer is otherwise found to be true and dependable, judicial pragmatism requires that merely because the panchas do not support, it should not be made a ground to discard his evidence."

Applying the aforesaid legal position to facts of this case, the plea that the panch witnesses have not supported the prosecution case and, therefore, the case is not proved and the appellant is entitled to acquittal, cannot be upheld.

16. The prosecution has examined Police Constable Shri Dilipkumar Alabhai Chavda [P.W.2], Ex.14. He has deposed that since one and half years before the date of his deposition [i.e. 12.08.1997], he was serving as a Police Constable in the Narcotic Cell, C.I.D., Crime Branch and as such, he was on duty in the Office on 25.09.1996. He has further deposed that Shri P.M.Jadav informed him that he was required to accompany him for one raid for which they had to go to Memco Railway Crossing. He was informed of that one person was to come with an opium at about 16.00 to 17.00 hours and that, that person was to come by carrying with him one gunny hand bag containing an opium. He has further deposed that for this information given to him, a preliminary panchnama was drawn in the office and thereafter, by sitting in government vehicle, he in company of one Pathan Saheb, Jadav Saheb, Chudasama Saheb, Katara and Paragbhai and two panch witnesses, left the office for the place where that person was to come. He has further deposed that after reaching that place, he got down from the vehicle and they took their respective positions in scattered condition and in the meanwhile, one person was seen passing on the road at about 4.00 to 4.50 p.m., Shri Jadav identified that person and then that person was apprehended by the police personnel and panch witnesses, who were standing nearby and in his presence that person was asked as to what was his name and he [appellant] informed that his name was Sajjansing. He has further deposed that Shri Jadav asked him as to whether he wanted

to be searched in presence of a Gazetted Officer or a Magistrate and if wanted to be so searched, that officer could be called by him. According to him, that person declined. He was informed of about this option by giving him a writing, also. Thereafter, the gunny hand bag which was with that person was checked. In that gunny hand bag, there were two plastic boxes, one was big and another was small. That boxes were opened and it was found that both were containing a thick semi liquid substance. That substance was smelt by police personnel and panch witnesses and on smelling, it was ascertained that, that substance was an opium. He has categorically deposed that Shri Jadav had asked him to weigh that substance. According to him, the weight of bigger box was found to be 950 grams, while weight of smaller box was found to be 800 grams. He has further deposed that in all, that substance was found weighting 1 kilogram and 750 grams and sample of 50 gms. was taken from each of that two boxes. That samples were to be sent to F.S.L. He has further deposed that second sample was taken separately as Reserve Sample. The samples which were taken for sending to F.S.L. were put in plastic bags and, thereafter, that bags were separately placed in tin boxes. Thereafter, the tin boxes were wrapped with paper and after putting panch slip, it was tied down with the string and, thereafter, it was sealed by putting a seal of P.I., N.D.P.S., C.I.D., Crime [written in English]. Thereafter, that original plastic boxes were also duly packed and sealed accordingly and each plastic box was given Mark A and B, separately. The tin boxes, in which, the samples were taken, were given Mark A/1 and B/1 and samples which were taken as Reserve samples were given Mark A/2 and B/2. He has further deposed that a panchnama was drawn at that place for the entire procedure followed. He has further deposed that the Investigating Officer recorded his statement. He identified the appellant herein, who was sitting in the trial Court and the muddamal articles before the Court. This witness has been cross-examined by the learned advocate for the appellant herein, who appeared in the trial Court. In the cross-examination, he has deposed that it was required to inform the control office for the vehicle in which, they went to the place of raid. He has admitted that he was not remembering the registration number of that Government vehicle. He has also admitted that there were so many shops and hand-carts of vegetables on road in between the office and the place of raid. He has further deposed that Investigating Officer had recorded his statement, once in which, he has not stated that a preliminary panchnama was drawn. He has also admitted that he did not state in his police

statement that panch witnesses were called and a preliminary panchnama was drawn. He has also admitted that he did not state in his police statement that at that time, one person was seen by passing on the road with opium in his gunny hand bag. He has stated that he did state that complainant stopped the person who came there. He has been cross-examined on very minor facts, but as a whole, his evidence inspires confidence of this Court. His evidence is trustworthy and dependable. A case has been suggested and which is denied by him that to save other offenders, the present appellant has been involved. On reading cross-examination, we find that whatever evidence he gave in his examination-in-chief was not at all shattered. He withstood in the entire cross-examination.

17. The prosecution has examined Shri Kishanrao Laxmanrao [P.W.3], at Ex.17. He has deposed that in the year 1996, he was performing his duty as Police Head constable in State Narcotic Cell, C.I.D. Crime, Ahmedabad. On 26.09.1996, the Police Inspector Shri Jadav had given him muddamal articles namely two sealed boxes of C.R.No.II-11/96 of Gandhinagar Zone Police Station, together with a prescribed form, for carrying them to Forensic Laboratory. He has further deposed that he deposited that muddamal articles in the office of F.S.L. and receipt which was given from that Laboratory to him, was handed over to P.I. Shri Jadav. For this receipt, Shri Jadav had recorded his statement. He was shown Ex.18, which is a copy of forwarding letter along with which he carried the muddamal articles to F.S.L. He has identified the receipt Ex.19 of F.S.L., which he gave to Shri Jadav. This witness is cross-examined by Mr.J.R.Dave, learned advocate, who appeared for the appellant herein, in the trial Court. He has admitted that he was not given any written order by Investigating Officer directing him to carry that muddamal articles to F.S.L. He has further deposed that his statement was not recorded by the Investigating Officer on the date on which he carried the muddamal articles to F.S.L. A case has been suggested and it is denied by this witness that he did not carry any muddamal article to the F.S.L. He has denied a suggestion that he is giving a false deposition at the instance of Investigating Officer. If we read his cross-examination of only four lines, we find that this witness is not seriously cross-examined by the accused No.1. Whatever facts were deposed to by him in his examination-in-chief, stand unchallenged. The cross-examination is in the form of putting suggestions and, in fact, that suggestions are denied by this witness.

18. The prosecution has examined the complainant Shri Prakash Mahendrabhai Jadav [P.W.5], at Ex.22. He has deposed that he is performing his duty as Police Inspector in Narcotic Cell, C.I.D., Crime, Ahmedabad. On 25.09.1996, he was present there in the office of Narcotic Cell. Meanwhile, he received an information from his informant that one person looking like Marwadi whose name is Sajjansing, resident of Chandannagar, Memcowala and having oval shape face, and who had put on Khakhi coloured pantaloon and full sleeved printed shirt, was going to pass from Kalyan Toll Naka to Naroda, via Memco, during the period between 16.00 hours and 17.00 hours. The informant had also informed him that person was to carry with him one gunny hand bag on which writing of "Rentio Tuver Dal" was printed and that he was to carry with him an opium. He has further deposed that he informed the Police Superintendent of Narcotic Cell in writing and further that he sent one police head constable Shri Maganbhai to call two persons, who can act as panch witnesses. He has further deposed that on arrival of panch witnesses, he informed of the panch witnesses and police personnel with the information which he had received. That police personnel and panch witnesses had shown willingness to remain present along with him during the raid. The police personnel and the panch witnesses took search of each other, interse, but no incriminating article was found from them. Thereafter, he registered the information, which he had received in the register. He has then deposed that thereafter, by taking with him necessary articles for raid and in company of panch witnesses and police personnel, he left his office for place indicated in information by sitting in government vehicle for the purpose of raid. He has further deposed that thereafter, after leaving the office, they reached Memco Railway Crossing via Rameshvar Temple and Meghaninagar Road and after reaching there, they parked their vehicle in front of one shop of bricks, sand and grit stones. Thereafter, he in company of panch witnesses and police personnel started to go on foot, scatteredly and they reached near Chaudhary Pan Centre and one Tea Hand-cart via Memco Four Way Crossing by taking a turn on right side. He has further deposed that they took their respective positions in scattered condition for keeping watch at 16.05 hours. Meanwhile, at about 16.40 hours, one person resembling, the description of person for whom he received the information, was seen passing on the road and at that time that person had one gunny hand bag in his hand. The police personnel rushed to that person and caught hold of him there and then. Meanwhile, panch witnesses and other

police personnel reached to that place. In presence of panch witnesses, he asked the name of that person and on being asked that person gave his name as Sajjansing alias Raju Jagdishsing Panvar, resident of Chandannagar, Memco, aged about 22 years. That person was no one else, but the appellant herein. On examining the hand bag, which was with him in his hand, it was found that there was a writing of "Rentio Tuver Dal" printed on that hand bag. He has further deposed that thereafter, the complainant in presence of Police Inspector Shri Pathan and panch witnesses gave their identification to that person saying that the said two officers were Gazetted Officers and out of them two were the panch witnesses. He has further deposed that thereafter, the complainant informed that person that they had an information that he was to pass by carrying with him an opium and for that he was required to be searched. He was also informed that he was entitled to get himself searched by a Gazetted Officer or a Magistrate and that he was at liberty to take search of police personnel and the panch witnesses. He has further deposed that for giving such information to that person, a written information was given to him. The appellant declined and, thereafter, that gunny hand bag was searched. One of the handle of that hand bag was of red colour and there was a writing in both Gujarati and English stating "Rentio Tuver Dal" which was printed on it and there was also an impression of emblem of "Rentio" on it. As per his evidence, there were two plastic boxes inside that gunny hand bag, out of which one was big and other was small. Thereafter, lids of that boxes were opened and on opening that boxes, it was found that there was a black - brown coloured thick semi liquid substance opium in that boxes. He has further deposed that lid of big plastic box was of blue colour. He has further deposed that thereafter, he got that opium weighed by taking help of Police Constable Shri Chavda and on getting weighed, it was found that it was 950 grams of opium. He has further deposed that two samples each of 50 grams were taken out from that opium and that samples were taken in plastic bags and that plastic bags were separately put in tin boxes with label of Babul Jafra Jarda 135. That two tin boxes and the plastic boxes from which opium was found, were closed. Mark A was given to plastic box, while tin box containing sample was given Mark A/1 and tin box, which was kept as Reserve Sample was given Mark A/2. He has further deposed that these three boxes were wrapped in paper and were tied with the string and, thereafter, by putting a paper slip bearing signatures of panch witnesses, on each box, it was sealed with seal of P.I. N.D.P.S. G.S. C.I.D. Crime Ahmedabad [written in English]. He has further

deposed that thereafter, the second plastic box closed with red coloured lid, was got weighed with the help of Police Constable Shri Chavda and on getting that second box weighed it was found that it was weighing 800 grams. He has further deposed that in a similar way two samples each of 50 grams were taken from that second plastic box and that two samples were taken in tin boxes with label of Babul Jafra Jarda 135. That two samples and second plastic box were packed and sealed in a similar way. Out of two samples of tin boxes, one was given Mark B/1 and second was given Mark B/2, which was treated as Reserve Sample. Second plastic box was also packed and sealed as aforesaid and it was given Mark-B. According to him, total 1 kilogram and 750 grams opium worth Rs.46,000/-[Rupees Forty Six Thousand Only] was seized from the appellant herein. He has further deposed that currency of Rs.17/-- was found on making search of "person" of accused and that Rs.17/-- and gunny hand bag were seized and seizure memo was given to the appellant herein. Thereafter, the appellant herein was given an information with regard to his arrest in writing. He has further deposed that for these all formalities which he had performed at the place of search, a detailed panchnama was also drawn. A forwarding letter was also prepared. He has further deposed that by taking with him seized muddamal articles and the custody of the accused, he lodged his complaint. The muddamal receipt was prepared and other formalities were performed. He has further deposed that thereafter, he took over the investigation of the case.

18.1 He has further deposed that on the next day, he recorded the statements of police personnel, who had accompanied him. He also interrogated the accused. He has specifically deposed that he sent muddamal articles along with the forwarding letter through messenger Head constable Shri Kishanrao Laxmanrao to F.S.L. for the purpose of analysis. He has deposed that he informed his Superior Officer about the raid which he carried out. Thereafter, along with the production report and the report for remand, he forwarded the accused to the Court and obtained a police remand for a period upto 30.09.1996. He has further deposed that during the course of police remand, on making interrogation of accused No.1, it was revealed that one Laherilal Roshanlal had given that muddamal articles to accused No.1 and, thereafter, keeping accused No.1 with him, the search of Laherilal Roshanlal was made on 29.9.1996. That Laherilal Roshanlal was arrested at the place opposite to Omkar Mill. He was also informed about his arrest and his statement was recorded. That Laherilal

Roshanlal was accused No.2 in the case. Thereafter, necessary formalities were performed for arrest and custody and, thereafter, police remand was sought for accused No.2. The accused No.2 was kept with him for the period upto 03.10.1996 and, thereafter, he was produced before the Court. He has further deposed that thereafter, charge-sheet was filed against both the accused in the Court.

18.2 This complainant has produced and proved Entry No.38 from page No.7 of the information register at Ex.23. He has also produced and proved a copy of letter Ex.24 written to Superintendent of Police of Narcotic Cell. He has also produced and proved by deposing that letter Ex.24 was written by his writer Hirabhai and that he knew his [Hirabhai's] handwriting and the contents of letter were correct and that it bore his signature. Thus Ex.24 is duly proved by him. He has also proved a panchnama consisting of part of preliminary panchnama and the subsequent second part of panchnama, which was drawn at the place of raid. He has deposed that after completion of panchnama, the panch witnesses had signed it in his presence and that panchnama was written by police constable Shri Dalpatbhai and he knew his handwriting. He has further deposed that the contents of panchnama were correct and, therefore, panchnama was given Ex.25. This complainant has also produced and proved a written information given to the accused for making compliance of Section 50 of the N.D.P.S. Act at Ex.26. He has deposed that this written information Ex.26 was written by Head constable Shri Hirabhai and that he knew his handwriting. He could not say the name of person, who wrote the endorsement, which is alleged to have been written by the accused in his presence. He has definitely said that the accused put his signature below that endorsement and thus, this written information Ex.26 is proved by the complainant. Similarly, he has produced and proved the seizure memo Ex.27, which was written by the head constable Hirabhai. He has deposed that panch witnesses and accused had signed Ex.27 in his presence. He has also produced and proved a letter Ex.28 showing the grounds of arrest. According to him, it was written by the head constable Hirabhai in his own handwriting known to him and accused signed that letter Ex.28 in his presence. Similarly, he has produced and proved the complaint Ex.29. He has specifically deposed that Head constable Hirabhai wrote that complaint as per his dictation and the contents of that complaint were correct and accordingly, the complaint Ex.29 is proved. He has also produced and proved a report Ex.30 along with which he had sent the complaint, panchnama, mudammal articles

and custody of accused to P.S.O. of Police Station. This report Ex.30 is in handwriting of constable Shri Hirabhai. He has also produced and proved the forwarding letter Ex.18 sent to F.S.L., Ex.19 receipt issued by F.S.L. and given to him by the head constable Shri Kishanrao, Ex.20 is a report of F.S.L. He has identified the muddamal articles Mark A and B and the paper slips bearing the signatures of panch witnesses. He has also identified that slips Ex.31 to 36. He has also identified the appellant herein, who was present before the trial Court.

18.3 This witness [complainant] has been cross-examined at length by the learned advocate for the accused No.1. He has admitted that he did not write the name of informant in the information register and that he has not recorded the statement of the informant. A suggestion was put by way defence in the cross-examination and he denied that no muddamal articles were found from the accused Sajjansing. He has denied a suggestion that he cannot say in whose custody the muddamal articles/samples remained during the period from 26.09.1996 to 12.12.1996, till that samples were analysed. He has voluntarily stated to the trial Court that the samples had remained in office of F.S.L. He has also admitted that he has not stated in his complaint that the muddamal articles had remained in his custody. This witness has voluntarily stated to the Court that after taking accused in his custody the muddamal articles had remained in his custody. From the cross-examination, it also appears that alleged endorsement of accused with regard to option given to him for compliance of Section 50 of the N.D.P.S. Act below Ex.26 was written by accused in his presence. This witness has deposed that he was not able to say as to who had written that endorsement and, therefore, that endorsement was de-exhibited by the learned Judge of the trial Court. From the cross-examination, it appears that this witness is not shaken on material parts of evidence connecting the accused with the crime. He withstood the cross-examination and stuck to his evidence given in examination-in-chief. At the end of his cross-examination by the accused No.1 a suggestion was put and it was denied by him that only to receive award a false case has been lodged against the accused and that he is not in a position to say with certaintity as to whether he has received any award in the case on hand.

19. We have carefully considered the evidence of complainant - Shri Prakash Mahendrabhai Jadav [P.W. 5]. We have found that his evidence has been corroborated by

panchnama Ex.25. His evidence is corroborated by the police head constable Shri Dilipkumar Alabhai Chavda [P.W.2], who is examined at Ex.14. This witness Dilipkumar Alabhai Chavda had remained present through out the raid in company of the complainant. Therefore, this is not a case in which the evidence of complainant does not get corroboration from any other evidence. His evidence is corroborated by the oral evidence of Shri Dilipkumar and other documentary evidence, on record.

20. In above contextual evidence of the case, we will consider the contentions taken by Mr.R.M.Agarwal one by one. His contentions are mainly on the ground of noncompliance of the provision of the N.D.P.S. Act like Sections 42, 50, 52, 55, 57 of the N.D.P.S. Act and also under Section 102(3) of Cr.P.C. In this type of cases, generally, the arguments are advanced that the provisions of particular mandatory sections of the N.D.P.S. Act are not complied with and, therefore, the search and seizure were illegal and on the basis of illegal search and seizure, the whole trial has become vitiated for which benefit should be given to the accused.

20.1 The Hon'ble Supreme Court has given certain guidelines in the case of SAJAN ABRAHAM Vs. STATE OF KERALA, reported in 2001 AIR SCW 2970 on which Mr.R.M. Agarwala has placed reliance. The Hon'ble Supreme Court has voiced the caution by observing in para-6 as follows:-

> "In construing any facts to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature, time and again has made some of its provisions obligatory for the prosecution to comply, which the Courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of law. The Court however while construing such provisions strictly should not interpret it so literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and

circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out."

21. Keeping in mind the aforesaid guidelines, following contentions taken by Mr.R.M.Agarwal and replies given to that contentions by Ms.B.R.Gajjar are dealt with by us separately.

22. First we would like to deal with major and important contentions taken by Mr.R.M.Agarwal. One of the contentions taken by Mr.Agarwal is to the effect that the complainant, P.W.5, Police Inspector, Shri Prakash Mahendrabhai Jadav, Ex.22 had no authority whatever under the provision of N.D.P.S. Act to search, seize and arrest and, therefore, whatever action has been taken by Shri Prakash Mahendrabhai Jadav [P.W.5] was without authority under the N.D.P.S. Act. As per Sub-Section (2) of Section 41 of the N.D.P.S. Act any such officer of gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government or any other departments including police department of a State Government as is empowered in this behalf by general or special order of the State Government have powers of entry, search, seizure, detention and arrest without warrant between sun rise and sun set exercisable under said Section 42(1) of the N.D.P.S. Act. These powers are conferred under Section 41(3) of the N.D.P.S. Act.

Empowered Officer who is a Gazetted Officer may also authorise any officer subordinate to him to exercise the same powers. The State of Gujarat has issued a notification No.GH-L.14-NDS-1087 (i)-M. dated 15th June, 1985 of which reference is there on page No.1419 of the book named An Exhaustive Commentary on The Narcotic Drugs & Psychotropic Substances Act & Rules, by N. K. Rastogi, Edition of 2002. This notification reads as follows :-

"Noti.No. GH-L.14-NDS-1087 (i)-M. dated 15th June 1985 - In exercise of the powers conferred by Sub-sec. (2) of Sec.41 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of all previous orders

or notifications issued under Sec.22 of the Dangerous Drugs Act, 1930 (II of 1930) and in force in any part of the State, the Government of Gujarat hereby empowers for the purpose of the said Sub-sec. (2) of the following officers of the State Government, namely :-

1. All officers of the Police Department of and above the rank of Inspector of Police posted in any part of the State of Gujarat.

2. All Officers of the Prohibition and Excise Department in the State of Gujarat of and above the rank of Inspector, Prohibition and Excise Department.

3. All the Inspector appointed under the Drugs and Cosmetics Act, 1940, (XXIII of 1940), in the State of Gujarat."

The other relevant Notification issued under Section 53(2) of the N.D.P.S. Act by the State Government reads as follows.

"Noti. No.GH/L/NDS/1087 (iii)-M. dated 15th June 1985 - In exercise of powers conferred by Sub-sec. (2) of Sec.53 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and in supersession of all previous orders or notifications, issued under Sec.22 of the Dangerous Drugs Act, 1930 (II of 1930 and in force in any part of the State, the Government of Gujarat hereby invests the following officers with the powers of an officer, in charge of a Police Station within the limit of their respective jurisdiction for the investigation of an offence, under the said Act, viz. (1) All officers of Prohibition and Excise Department, in the State of Gujarat, of and above the rank of a Sub-Inspector (2) All the Inspector appointed, under Sec.21 of the Drugs and Cosmetics Act, 1940 (XXIII of 1940)."

22.1 If we read the evidence of P.W.5 i.e. complainant, who investigated the case also, we find that in categorical statement, he has deposed that he is performing his duty as Police Inspector in the Narcotic Cell, C.I.D. (Crime). This fact is not challenged in the cross-examination by the learned advocate, who

appeared for the appellant herein, in the trial Court. From the documentary evidence, it appears that, this complainant, P.W.5 Shri Prakash Mahendrabhai Jadav received a secret information from the informant at about or around 15.45 hours and on receipt of such information, he, immediately made an Entry at Sr.No.38 in the information register, as deposed to by him at 15.45 hours and that entry is produced and proved at Ex.23. As per evidence of P.W.5 Shri Jadav, he, immediately, thereafter, sent a copy of information to his immediate Superior Officer by writing a confidential letter dated 25.09.1996 of which a copy is produced at Ex.24. In this letter also, he had described himself, as Police Inspector. The original of Ex.24 was received by his immediate Superior Officer and according to his deposition Shri Mohan Zha, Police Superintendent received an original of the letter Ex.24, at 17.30 hours on 25.09.1996. At this stage, it is required to discuss the evidence with regard to time as to when original of this Ex.24 was received by Shri Mohan Zha. From the paper book, by reading a copy of Ex.24, Mr.R.M.Agarwal has vehemently argued that the original of this Ex.24 was received by Superior Officer at 14.30 hours on 25.09.1996. He has argued that when prosecution has come with a case that the entry with regard to secret information was registered at 15.45 hours, how letter Ex.24 incorporating the secret information, was received by Shri Mohan Zha, much earlier at about 14.30 hours. Looking to this contention taken by Mr.Agarwal, we have, immediately, examined the original of Ex.24 from the record and proceedings of the case, called for from the trial Court. We find that it was not a time of 14.30 hours, but it was a time of 17.30 hours. Figures of time below the endorsement made by Shri Mohan Zha clearly indicate that the time was 17.30 hours and not 14.30 hours. Figure "7" in aforesaid time is tried to be misread as "4" by Mr.R.M.Agarwal. We are of the definite view that, that time of receipt of original Ex.24 by Shri Mohan Zha was not 14.30 hours but it was a time of 17.30 hours.

22.2 Even in panchnama Ex.25, it is mentioned that a preliminary panchnama was drawn by Shri Jadav, Police Inspector. Likewise a subsequent panchnama after carrying out a raid, was also drawn by Shri Jadav, Police Inspector. Ex.26 which is a written information given to the accused for making compliance of Section 50 of the N.D.P.S. Act, was given by Shri Jadav, Police Inspector. The seizure Memo Ex.27, clearly appears to have been signed by Police Inspector Shri Jadav. A written information giving grounds for arrest and signed by the

accused, was also prepared and signed by Shri P. M. Jadav, Police Inspector [complainant], Ex.25 clearly speaks that it was given by Police Inspector Shri Jadav. From this set of evidence, referred to hereinabove, it is crystal clear that Shri P.M.Jadav, was a complainant, who carried out the raid and subsequently, he investigated the case, as a Police Inspector and not as a Police Sub-Inspector. It appears that, in the opening part of the deposition, the learned Judge of the trial Court has stated P.S.I. in the column of occupation. This is nothing but a typographical error. We are completely satisfied that Shri P. M. Jadav was a Police Inspector.

In view of what is stated hereinabove, the complainant Shri P.M. Jadav was a Police Inspector having been conferred with the powers under Section 41(2) of the N.D.P.S. Act and in no case, it can be said that he was an authorised officer under Section 42(1) of the N.D.P.S. Act. He was empowered officer under Section 41(2) of the N.D.P.S. Act. As discussed earlier, Shri P.M.Jadav being a Police Inspector was also authorised with the powers under Section 53 of the N.D.P.S. Act. In view of this, first contention that Shri Jadav had no powers to search, seize and arrest under the N.D.P.S. Act, is devoid of merits and, therefore, it is negatived.

23. The second contention taken by Mr.R.M.Agarwal is to the effect that the complainant was authorised officer under Section 42(1) of the N.D.P.S. Act and, therefore, in view of the provisions of Section 42 of the N.D.P.S. Act, he was required to reduce the secret information, which he received into writing without any delay and, thereafter, he was required to send a copy of that information to his immediate Superior Officer, forthwith. He has argued that in this case, these two requirements of Section 42 are not complied with and, therefore, this noncompliance of Section 42 of the N.D.P.S. Act has vitiated the trial and, therefore, the accused should be acquitted. In support of his arguments, he has placed reliance on two cases namely [1] Beckodan Abdul Rahiman [Supra] and [2] State of Orissa Vs. P.Simanchal Patra [Supra].

23.1 As against the above submission, Ms.B.R.Gajjar, learned APP for the respondent i.e. State of Gujarat has drawn our attention to fact that P.W.5 Shri P. M. Jadav, who received a secret information from the informant was, no doubt, required to take down the information on paper, but as he was not an officer under Section 42(1) of the N.D.P.S. Act, he was not required to send a copy of such information to his immediate

Superior Officer. To substantiate her arguments, she has argued that P.W.5 Shri P. M. Jadav being a Police Inspector was a gazetted officer. Further the State Government has, by its notification No.GH-L.14-NDS-1087 (i)-M. dated 15th June, 1985 empowered under Section 41(2) of the N.D.P.S. Act, all the officers of the Police Department of and above the rank of Inspector of Police posted in any part of the Gujarat and, therefore, he was not an officer under Section 42(1) of the N.D.P.S. Act and he was an empowered officer under Section 41(2) of the N.D.P.S. Act. If we peruse Section 41(2) of the N.D.P.S. Act, we find that such gazetted officer having rank of Police Inspector in the Police Department was only required to reduce a secret information into writing. Section 41(2) of the N.D.P.S. Act, does not require such officer to send a copy of information to his immediate Superior Officer, as we find it necessary in Section 41(2) of the N.D.P.S. Act. Hence, according to us P.W.5 Shri P.M. Jadav was required to reduce a secret information which he received. Here in this case, P.W.5 Shri P.M. Jadav has categorically deposed in his examination-in-chief that on receipt of information, he made an entry in Register. Ex.23 is a xerox copy of Entry No.38 from page 7 of the information register. He has deposed that Ex.23 is a note with regard to reducing of that information into writing. If we peruse Ex.23 we find that this is an Entry No.38, which was made at 15.45 hours on 25.09.1996. This entry speaks for the particulars of information, which he had received. It is required to take into consideration the fact that as per Ex.23 a secret information was reduced into writing and immediately, thereafter, the Superintendent of Police was informed about this information by sending a writing. That writing is at Ex.24. Simultaneously, two panch witnesses were called and they were also made to understand about the information which he had received. If we peruse a part of a preliminary panchnama of Ex.25, we find that the preliminary panchnama was drawn at 15.30 hours and was completed at 15.45 hours. So according to us, immediately on receipt of secret information from the informant at the earliest point of time, P.W. 5 Shri P.M.Jadav reduced that information into writing in first part of panchnama Ex.25, also. In Section 41(2) of the N.D.P.S. Act, nowhere it is stated that such type of information should be reduced into writing in particular register. When information was reduced into writing in first part of panchnama at Ex.25, the compliance was made by Shri P.M.Jadav. In case of STATE OF PUNJAB Vs. BALBIR SINGH, reported in (1994) 3 SCC 299 on which Mr.R.M.Agarwal has placed reliance, it has been held by the Hon'ble Supreme Court as under :-

"the testimony of a witness is not to be doubted or discarded merely on the ground that he happens to be an official but as a rule of caution and depending upon the circumstances of the case, the courts look for independent corroboration. This again depends on the question whether the official has deliberately failed to comply with these provisions or failure was due to lack of time and opportunity to associate some independent witnesses with the search and strictly comply with these provisions."

It has further been held in the aforesaid case that --

"Therefore these provisions make it obligatory that such of those officers mentioned therein, on receiving an information, should reduce the same to writing and also record reasons for the belief while carrying out arrest or search as provided under the proviso to Section 42(1). To that extent they are mandatory."

23.2 Here in this case, a secret information was received by P.W.5 Shri P.M.Jadav and it was to the effect that a particular person of particular description was about to pass on road. As per the secret information, which was reduced into writing at the earliest point of time in first part of preliminary panchnama of Ex.25, one person looking like Marvadi by name Sajjansing resident of Chandannagar, Memco by carrying with him a gunny hand bag was to pass on road and he was to come from Memco going to Kalyan Toll Naka, Naroda Road. As per the evidence led by the prosecution and as per panchnama Ex.25 at 16.40 hours, a person resembling the person whose description was given in an information, was found coming on the road from Omkar Mill side and when he came at the junction of Four Way Crossing, he was stopped there and his search was made. Ms.Gajjar has argued that thus, the accused was found in a public place, he was not found in any private premises. He was not found from any building, conveyance or enclosed place. As per the description stated in preliminary panchnama for that place, it was a public place. Ms.Gajjar has argued that when person was found with contraband articles in a public place, Sections 41 and 42 of the N.D.P.S. Act are not applicable and only Section 43 of the N.D.P.S. Act is applicable. Section 43 reads as follows :-

"43. Power of seizure and arrest in public places. - Any officer of any of the departments mentioned in Section 42 may -

(a) seize, in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under Chapter IV relating to such drug or substance.

(b) detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and, if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Explanation. - For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public."

In support of her arguments, she has placed reliance on the following decisions. In the case of ASLAMBHAI IBRAHIMBHAI MEMON AND ANOTHER Vs. THE STATE OF GUJARAT, reported in 1990 Cri. L.J. 1787, it has been held that "whenever any search or seizure is to be made in any public place or in a vehicle in transit or any person is to be arrested or detained from a public place, it is not intended by the Legislature to take down the said information in writing." In the case of Narayanaswamy Ravishankar [Supra], it has been held that "if search and seizure is conducted in a public place, Section 43 will be applicable and not Section 42 and, therefore, the question of noncompliance in any of the provisions of Section 42 is wholly irrelevant."

23.3 Still, however, herein this case, P.W.5 Shri P.M. Jadav being a gazetted officer was an empowered officer

under Section 41(2) of the N.D.P.S. Act and, therefore, he has reduced the information into writing first in part of preliminary panchnama of Ex.25 and, immediately, thereafter, he made a note of that information in Register vide entry at Ex.23 and, therefore, essential compliance of Section 41(2) of the N.D.P.S. Act was made by Shri P. M. Jadav.

As there is no provision similar to Section 42(2) of the Act in Section 41(2) which relates to empowered gazetted officer question does not arise for sending copy of information to his immediate Superior Officer. Though it was not necessary for Shri P.M.Jadav to send a copy of information to his Superior Officer, herein this case that requirement was also complied with by Shri P.M.Jadav. Shri P.M.Jadav, P.W.5 has deposed that Ex.24 is a copy of letter prepared by his writer Hirabhai which was sent to his immediate Superior Officer Shri Mohan Zha, Superintendent of Police, Narcotic Cell, Ahmedabad. That copy of letter is produced at Ex.24.

By misreading an endorsement below Ex.24, Mr.R.M.Agarwal has tried to confuse this Court that this letter was received by concerned Superior Officer at about 14.30 hours. As discussed earlier, we have carefully perused the original Ex.24 from record and proceedings of the case, called for by us from the trial Court and we have found that time of receiving of that letter Ex.24 was at 17.30 hours and was not 14.30 hours. Therefore, the arguments of Mr.Agarwal that entry No.23 was made, subsequently, after letter was received by the Superior Officer at 14.30 hours, are not convincing and acceptable in view of the original endorsement on Ex.24 in the record and proceedings of the case.

23.4 In view of above legal position, P.W.5 Shri P.M.Jadav was not required to comply with Section 42 of the N.D.P.S. Act because looking to the facts the accused was searched in public place, and therefore, Section 43 of the N.D.P.S. Act will be applicable. There is no provision like Section 42(2) of the N.D.P.S. Act in Section 43 of the N.D.P.S. Act. Still, however, in this case, the prosecution has proved by leading cogent and satisfactory evidence that P.W.5 Shri P.M.Jadav had complied with requirement of Section 41(2) of the N.D.P.S. Act by reducing the secret information into writing at the earliest point of time in first part of panchnama Ex.25. There is no requirement in Section 41(2) of the N.D.P.S. Act that an information received by the officer is required to be reduced into writing in a particular register or in a particular manner. When

secret information is reduced into writing in the first part of the panchnama Ex.25, the compliance of Section 41(2) of the N.D.P.S. Act is established.

Under the circumstances, we are of the considered view that herein this case, Section 42(1) of the N.D.P.S. Act is not applicable. Looking to the fact that P.W.5 Shri P.M.Jadav was a gazetted officer and who was empowered by the Government of Gujarat under Section 41(2) of the N.D.P.S. Act, Section 41(2) of the N.D.P.S. Act will be applicable and requirements of Section 41(2) of the N.D.P.S. Act were fully complied with by Shri Jadav.

24. Now the third contention is of vital importance as argued by Mr.R.M.Agarwal. He has argued that in this case, before searching the accused, he was not informed of about the existence of his right of being searched in presence of gazetted officer or a magistrate. He has argued that looking to the evidence of Shri P.M.Jadav, it is not proved by the prosecution that Shri P.M.Jadav informed the accused about the existence of his right of being searched in presence of gazetted officer or Magistrate. He has argued that in view of the conclusion No.2, in para-51 of the case of State of Punjab Vs. Baldevsingh [Supra], the failure to inform the concerned person about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused. No doubt, the Hon'ble Supreme Court has on the basis of the reasoning and discussion listed certain conclusions in para-51, but at the same time, it is stated in para-52 of the aforesaid case as follows :-

"The above conclusions are not a summary of our judgment and have to be read and considered in the light of the entire discussion contained in the earlier part."

In para-31 of the aforesaid decision, it has been held as follows :-

" Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicity make it imperative and obligatory and cast a duty of the investigating officer

(empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed by Section 50....."

In case of STATE OF PUNJAB Vs. BALDEV SINGH [Supra], in para-11, it has been observed as follows :-

"On its plain reading, Section 50 would come into play only in the case of a search of a person as distinguished from search of any premises etc. However, if the empowered officer, without any prior information as contemplated by Section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDPS Act is also recovered, the requirements of Section 50 of the Act are not attracted."

In support of his submissions, Mr.Agarwal has cited about 15 different decisions on the point with regard to compliance of Section 50 of the N.D.P.S. Act. We have carefully studied that decisions. They can be made applicable only if search of "person" is made and not for any other article carried by the offender.

24.1 As against the contention taken by Mr.R.M.Agarwal, Ms.B.R.Gajjar has argued that in this case, Section 50 will not be applicable because, as per information which was received by Shri P.M.Jadav [P.W.5], accused was to be found passing on the road and as per the case of the prosecution that accused was in fact found on a road while passing with carrying a gunny hand bag from which contraband articles were recovered. Ms.Gajjar has argued that the place from where the accused was found, was not a private premises. It was a public place and, therefore, Section 43 of the N.D.P.S. Act will be applicable and when the case falls under Section 43 of the N.D.P.S. Act, the question does not arise for making compliance of Section 50 of the N.D.P.S. Act.

24.2 Section 50 of the N.D.P.S. Act for which too lengthy arguments with vehemence are advanced by Mr.R.M.Agarwal, reads as follows :-

"50. Conditions under which search of persons shall be conducted -

(1) When any officer duly authorised under Section 42 is about to search any person under

the provisions of Section 41, Section 42 and Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate."

In view of the aforesaid text of Section 50 of the N.D.P.S. Act, this Section 50 of the N.D.P.S. Act will be applicable to the authorised officer under Section 42(1) of the N.D.P.S. Act, who is about to search any person. Herein this case, P.W.5 Shri P.M.Jadav, was an empowered officer under Section 41(2) of the N.D.P.S. Act and, therefore, in our view, Section 50 of the N.D.P.S. Act will not be applicable to the gazetted officer, who is empowered under Section 41(2) of the N.D.P.S. Act.

25. Ms.Gajjar has argued that in this case from the very beginning it is the case of the prosecution that the information was received by Shri P.M.Jadav to the effect that a particular person was about to pass near Memco Four Way Crossing by carrying with him a gunny hand bag in which he is carrying an opium. An evidence of P.W.5 Shri P.M.Jadav is to the effect that according to information, they were keeping watch near the place, which was described and indicated in the information and accused was found coming on the road and he was intercepted and it was found that he was carrying a gunny hand bag on which a writing of "Rentio Tuver Dal" was printed. A specific case is there that, that hand bag was in the hand of the accused. That hand bag was searched and it was found from that hand bag that there was an opium in two plastic boxes kept inside that hand bag. Ms.Gajjar has argued that looking to this fact, it is not a case of the prosecution that "person" of accused was searched. She has further argued that Section 50 will be applicable only if "person" was searched and for no other articles carried by offender. In support of her arguments, she has cited the following authorities.

[A] She has heavily placed reliance on the decision, in the case of KALEMA TUMBA Vs. STATE OF MAHARASHTRA AND ANOTHER, reported in (1999) 8 SCC 257. It is specifically held in unambiguous words in para-4 as follows :-

"The decision of this Court in State of Punjab v. Jasbir Singh wherein it was held that though poppy straw was recovered from the bags of the accused, yet he was required to be informed about

his right to be searched in the presence of a gazetted officer or a Magistrate, now stands overruled by the decision in Baldev Singh case. If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person". In this case heroin was found from a bag belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate."

[B] Another case cited by Ms.Gajjar is a case of JOSEPH FERNANDEZ Vs. STATE OF GOA, reported in (2000) 1 SCC 707. In this cited case, it was argued that Section 50 of the Narcotic Drugs and Psychotropic Substances Act was not strictly complied with by PW 8 of that case i.e. officer who conducted the search. According to the learned counsel for the appellant the searching officer should have told the person who was subjected to search that he had a right to be searched in the presence of a gazetted officer or a Magistrate.

In the aforesaid cited case, PW 8 had deposed that she told the appellant that if he wished he could be searched in the presence of the gazetted officer or a Magistrate to which the appellant had not favourably reciprocated.

In para-2, it is observed as follows :-

According to us the said offer is a communication about the information that the appellant has a right to be searched so. It must be remembered that the searching officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. Even then the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate." This according to us is in substantial compliance with the requirement of Section 50. We do not agree with the contention that there was noncompliance with the mandatory provision contained in Section 50 of the Act."

[C] The third decision on which Ms.Gajjar placed reliance is in the case of BIRAKISHORE KAR Vs. STATE OF ORISSA, reported in (2000) 9 SCC 541. "As per the facts stated in the aforesaid case, P.W.1 searched the train which had arrived at Platform No.1 of the Balasore Railway Station in company of officers and it was found

that the appellant [of that case] was found lying on a plastic bag in one of the compartments of that train. The said plastic bag was then seized and on verification, it was found containing 10 kg of poppy straw.

It has been held in para-3 by the Hon'ble Supreme Court as follows :-

"What is now contended by the learned counsel for the appellant is that the mandatory requirement of Section 50 of the NDPS Act, 1985, viz., that the person to be searched should be told about his right to be examined in the presence of a Magistrate or a gazetted officer was not complied with in this case. This contention is really misconceived. In this case it was not the person of the appellant which was searched. He was found sitting on a plastic bag which belonged to him and which contained poppy straw. As pointed out by this Court in State of Punjab v. Baldev Singh, Section 50 would come into play only in the case of search of a person as distinguished from search of any premises etc. As we do not find any substance in this appeal, it is dismissed."

[D] The fourth decision relied on by Ms.Gajjar is in the case of KANHAIYA LAL Vs. STATE OF M.P., reported in (2000) 10 SCC 380,in which it has been held by the Hon'ble Supreme Court as follows :

"Where the contraband (opium) was recovered not from the person of the accused but from a bag which he was carrying, noncompliance with the requirements of S.50, held, not vitiative of his conviction."

[E] Fifth case of GURBAX SINGH Vs. STATE OF HARYANA, reported in (2001) 3 SCC 28 is relied on by Ms.Gajjar. As per the facts stated in para-2 of the aforesaid case, "when P.W.2 Ishwar Singh was checking in second class compartment, the appellant who was sitting in the compartment became panicky and left the train from the door towards the side of engine carrying a katta [gunny bag] on his left shoulder. On suspicion, he was nabbed in the presence of the witness and it was found that he was carrying poppy straw weighing 7 kg in a polythene bag of white coloured."

It has further been held in paras 5, 6 and 7 as follows :-

"5. In Kalema Tumba this Court considered the mandatory requirement of Section 50 of the NDPS Act and held that only when "the person" of an accused is to be searched then he is required to be informed about his right to be examined in the presence of a gazetted officer or a Magistrate. The Court further held that in view of the decision in the case of Baldev Singh the decision rendered by this Court in State of Punjab v. Jasbir Singh wherein it was held that though poppy husk was received from the bags of the accused, he was required to be informed about his right to be searched in the presence of a gazetted officer or a Magistrate, stood overruled. In facts of that case the Court held that heroin was found from the bags belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate.

6. In the case of Baldev Singh the Constitutional Bench (in para 12) observed thus : (SCC p. 190).

"On its plain reading, Section 50 would come into play only in the case of a search of a person distinguished from search of any premises etc."

7. Further, after considering various decisions the Court held (in para 57) that when an empowered officer or a duly authorised officer acting on prior information is about to "search a person", it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing."

[F] Sixth decision relied on by Ms.Gajjar is in the case of SURESH GULABSING KUSHVAH AND ANR. Vs. STATE OF GUJARAT, reported in 2002 (1) G.L.H. 146. As per the facts stated in para-2, "P.S.I. of Shaher Kotada police station received an information to the effect that one Suresh Gulabsinh Thakur, aged about 30 years who had put on a sky-blue bush shirt with checks and a brown pant and

one other person Ravikaran Yadav, aged about 25 years, wearing a full sleeved blue shirt with linings and a cream coloured pant, were going to come from Suhana Restaurant side with "charas" and were to proceed towards Omkar Factory via Kalyan Toll Naka."

On the basis of the aforesaid information, P.S.I. and other police personnel were keeping a vigil, in about 20 minutes time, two persons of the aforesaid description were found coming from Suhana Restaurant side. The person with sky-blue bush shirt with checks and a brown pant was carrying a cloth bag ['theli'] and the other was walking along with him. When they were stopped by the police party, the accused No.1, who was carrying cloth bag, was apprehended at the place where he was stopped, while the accused No.2, who turned back and tried to run away, was caught by the police persons..... Thereafter, from the cloth bag which was carried by the accused No.1, a bundle was taken out in presence of panchas and when that bundle was opened, there came out from it dark pieces of material wrapped in a plastic bag. On sniffing that material, it appeared to be "charas".

In above contextual facts by placing reliance on three cases [1] Kalema Tumba v. State of Maharashtra reported in (1999) 8 SCC 257; [2] Kanhaiya Lal v. State of M.P., reported in (2000) 10 SCC 380 and [3] Gurbax Singh v. State of Haryana, reported in (2001) 3 SCC 28, the Division Bench of this Court has held in para-8 and 8.1 as follows :-

"8. If the "charas" was found from a cloth bag which was being carried by the accused No.1 and not from his person, and therefore, it was not necessary to make an offer for search in presence of a gazetted officer or a Magistrate, as envisaged by Section 50.

8.1 In the above view of the matter, there is no substance in the contention that there is any violation of the mandatory requirement of Section 50 of the said Act on the ground that the accused were merely asked whether they wanted to be searched before the Magistrate or the gazetted officer, and that they were not told that they had a right to opt for such search."

[G] Seventh case on which reliance is placed by Ms.Gajjar is in the case of NARAYANASWAMY RAVISHANKAR Vs.

ASSTT. DIRECTORATE OF REVENUE INTELLIGENCE, reported in (2002) 8 SCC 7. In that case it has been held by the Hon'ble Supreme Court as follows :-

"According to the prosecution, 5940 gms of heroin concealed in the bottom of a suitcase alleged to be belonging to the appellant was recovered when he was attempting to transport the same from the International Airport, Chennai to Singapore.

In the aforesaid case, it has been held in para-7 as follows :

that in the instant case, no search or seizure was conducted on the person of the accused and, therefore, the provisions of Section 50 of the NDPS Act were not attracted. The High Court was, therefore, right in coming to the conclusion which it did.

[H] Last eighth decision on which Ms.Gajjar has placed reliance is an unreported decision of this Court [Coram : J.M.Panchal & J.R.Vora,JJ] dated 5/6th February, 2002 rendered in Criminal Appeal No.12 of 2002 [parties names RAGHUBHAI GANDABHAI BHARWAD Vs. STATE OF GUJARAT] in which Mr.R.M.Agarwal appeared for the appellant. The facts similar to that of this case were emerging from the record of that case. On the basis of secret information received by Police Inspector Mr.Pathan and police personnel and panch witnesses had gone to Thaltej Cross Roads in a Government vehicle and maintained a watch there. At about 13.35 hours, a person who had put on the dress of a shepherd and whose description was given by the informer, was sighted with an embroidered bag in his hand. When the appellant [of that case] came near Thaltej Cross Roads, he was stopped by P.I. Mr.Pathak and informed that he was required to be searched, as an information had been received that he was possessing opium. Mr.Pathak had thereafter given option to the appellant that, if he so desired, he could be taken to the Gazetted Officer or the Magistrate for the purpose of search, but the appellant had not exercised the said option saying that he had full faith in him. Thereupon the bag, which was carried by the appellant, was searched from-where a cotton dhoti was found. On unrolling the dhoti, a transparent plastic bag was found, wherein a soft black substance like opium was kept. In that case Mr.R.M.Agarwal, who appeared for the

appellant of that case raised a contention that the search of bag, which was carried by the appellant with him, amounts to search of the person of the appellant and as the mandatory requirement of section 50 of the Act was not complied with in this case, the conviction of the appellant should be regarded as illegal. The Division Bench of this Court [Coram : J.M.Panchal & J.R.Vora,JJ], after considering the cases of [1] Kalema Tumba v. State of Maharashtra & another [Supra], [2] Sarjudas & Anr. v. State of Gujarat [Supra], [3] Birakishore Mar v. State of Orrisa [Supra] and [5] Kanhaiya Lal v. State of M.P. [Supra],held in the aforesaid unreported judgment in para 9.9 as follows :-

> "Therefore, in our view, when a bag carried by an accused in his hand is searched, it is not necessary for the investigating officer to comply with the provisions of section 50 of the N.D.P.S. Act because the person of the accused is not searched. In view of the clear proposition of law laid down by the Supreme Court that search of a bag does not amount to search of person of an accused, we are of the opinion that the appellant is not entitled to the benefit of Full Bench decision of this Court and we hold that it was not necessary for P.I. Mr.Pathak to inform the appellant that he had right to be searched either in the presence of a Magistrate or in the presence of a gazetted officer."

25.1 Applying the legal position settled in aforesaid eight decisions to facts of this case, in our case on hand, as discussed earlier, a "person" of the accused was not searched. What was searched was a gunny hand - bag, which was in the hand of the accused. In view of the aforesaid authorities, when a hand bag carried by offender was searched, Section 50 of the N.D.P.S. Act will not be applicable. In that view of the matter, arguments of Mr.Agarwal are misconceived and against spirit of Section 50 of the N.D.P.S. Act and, therefore, they are outright rejected.

25.2 Still, however, if it is assumed that Section 50 of the N.D.P.S. Act was applicable to this case, Section 50 of the N.D.P.S. Act was fully complied with because herein this case, P.W.5 Shri P.M.Jadav has specifically deposed in his evidence that the accused was made to understand that they [Police Personnel] had a secret information that he [accused] was about to pass by

carrying with him an opium, for which he [accused] was required to be searched. P.W.5 Shri P.M.Jadav has further deposed that he was informed that if he wanted to get search made in the presence of any gazetted officer or a Magistrate, then he was entitled to do so. P.W.5 Shri P.M. Jadav has been cross-examined at length but on the aforesaid evidence he is not cross-examined. His cross-examination is mainly on the document Ex.26, which is relating to the compliance of Section 50 of the N.D.P.S. Act. As per the case of the prosecution, even by informing the accused about his right of being searched in the presence of gazetted officer or a Magistrate, he was also given an information in writing Ex.26. Ex.26 was prepared by P.W.5 Shri P.M.Jadav and it was addressed to the accused, in which the accused was made to understand in Hindi language, that police had an information that he was to pass by carrying with him an opium from Memco to Kalyan Toll Naka, and he was required to be searched and for that police would make an arrangement, if accused wanted to keep present a gazetted officer or a Magistrate. He also informed him that the accused was also, at liberty, to search panch witnesses and police personnel. In the cross-examination, no question was put to this witness that the writing Ex.26 was never given to the accused. A general and vague case has been put, that documents were prepared later on. There is an endorsement signed by the accused to the effect that he did not want to call any gazetted officer or a Magistrate for the purpose of search and that he did not want to keep anyone present and further that police could take his search. From the evidence, it appears that, this endorsement was de-exhibited on the ground that P.W.5 Shri P.M.Jadav has deposed in his deposition that he was not in a position to say who wrote this endorsement. Even this endorsement is de-exhibited, fact remains that accused was given Ex.26 and for this Ex.26, he was informed that he was, at liberty, to keep present a gazetted officer or a Magistrate during the search for which the police would make an arrangement. In view of the legal position, in the case of JOSEPH FERNANDEZ [Supra]. P.W.5 Shri P.M.Jadav had made a substantial compliance of Section 50 of the N.D.P.S. Act. The Hon'ble Supreme Court has held in the aforesaid case that the officer had only Section 50 of the Act then in mind unaided by the interpretation placed on it by the Constitution Bench. The Constitution Bench of the Hon'ble Supreme Court decided the case of BALDEV SINGH [Supra] on 21.07.1999. Here in this case on hand, the search and seizure were made on 25.09.1996 and, therefore, obviously, P.W.5 Shri P.M.Jadav could not have anticipated, while searching that he was required to make

compliance of Section 50 of the N.D.P.S. Act, as per the legal position, which would be settled in future in the case of BALDEV SINGH [Supra] on 21.07.1999 and, therefore, merely because in specific terms, if the accused was not informed about his right to be searched in presence of either gazetted officer or a Magistrate, then it cannot be said that Section 50 of the N.D.P.S. Act is not complied with. On the contrary, in view of the evidence led by the prosecution, it can certainly be said that Section 50 of the N.D.P.S. Act has been fully complied with.

26. Mr.R.M.Agarwal has by taking fourth contention, argued that the Division Bench of this Court [Coram : J.M.Panchal & J.R.Vora, JJ.], which decided Criminal Appeal No.12 of 2002 dated 5/6th February, 2002 rendered in Criminal Appeal No.12 of 2002 [parties named RAGHUBHAI GANDABHAI BHARWAD [Supra] did not consider the case of SAJAN ABRAHAM [Supra]. He has emphatically argued that in the case of SAJAN ABRAHAM [Supra], the accused [in that case] was found standing on the road with the packet in his hand and that packet was searched. In para-10 of the said case, it has been observed as follows :-

> "10. In the present case we find the High Court recorded a finding that PW 5 informed the appellant about his right as provided under Section 50 of the Act which is established not only by the oral evidence of PWs 1, 3 and 5, but also by the recitals made in Ext. P-1 the seizure mahaZhar prepared by PW 5 and the F.I. Statement given by the respondent (the appellant before us). The submission, however, is communicating orally to the appellant is not a compliance under Section 50. We cannot agree. The aforesaid Constitution Bench upholds oral communication also to be valid under Section 50 of the Act. hence, this submission has no merit."

26.1 In the aforesaid case of SAJAN ABRAHAM [Supra], the trial Court acquitted accused by disbelieving the case of the prosecution. The High Court of Kerala in Criminal Appeal set aside the order of acquittal, and convicted and sentenced the accused. The accused carried the matter further to the Hon'ble Supreme Court and the Hon'ble Supreme Court negatived all the contentions of the accused and appeal was dismissed. If we read this authority of Sajan Abraham [Supra], we find that nowhere a particular specific ratio has been laid down that if

some article is found in the hands of the accused and on searching the hands, if it is found that some article was there in the hands of offender, then compliance of Section 50 of the N.D.P.S. Act is must. This cited case is decided only on the facts. According to Mr.R.M.Agarwal, the aforesaid case Sajan Abraham [Supra] has been decided by Hon'ble three Judges of Hon'ble Supreme Court and on placing reliance on that case, the Division Bench of this Court ought to have held that in case of search of hand bag in the hand of the offender Section 50 of the N.D.P.S. Act would be attracted and as this Division Bench has not followed the decision what is decided in the case of Sajan Abraham [Supra] then the decision of said Division Bench, is a judgment per-incurium. We do not agree with Mr.R.M.Agarwal, because the Division Bench of this Court has also considered the case of JOSEPH FERNANDEZ Vs. STATE OF GOA, reported in (2000) 1 SCC 707. This case of Joseph Fernandez [Supra] was also decided by the three Hon'ble Judges of the Hon'ble Supreme Court.

26.2 Mr.R.M.Agarwal has heavily placed reliance on authority in the case of LALESHWAR RAJAK KALANAND DHOBI Vs. STATE OF GUJARAT, [decided on 07.08.2002] reported in (2002) 7 SCC 704. He has argued that in that case, a pink-coloured cloth bag which was recovered from the accused, was searched in presence of panch witnesses and as a result of such search 8 lumps of charas total weighing 925 grams were found from that cloth bag. In that case, the Hon'ble Supreme Court has held that it is obligatory for the prosecution to inform the accused of his right to be searched by a gazetted officer or a Magistrate in order to comply with the mandatory requirement of Section 50. In that case, it was not done and, therefore, the Court has held that the trial stood vitiated and on that ground, the appeal was allowed.

There cannot be any dispute with regard to what is decided in the aforesaid case. In the present case on hand, the accused was informed of by writing at Ex. 26 for making compliance of Section 50 of the N.D.P.S. Act. It may be noted that in the cited case, the facts are not clear as to whether the accused was found from public place or not and, therefore, this authority cannot be straightway made applicable to the present case on hand. In our case, the accused was found from the public place and, therefore, Section 43 of the N.D.P.S. Act will be applicable and before carrying out the search under Section 43 of the N.D.P.S. Act by empowered officer under Section 41(2) of the N.D.P.S. Act, Section 50 of the N.D.P.S. Act will not be applicable.

26.3 As against the arguments of Mr.R.M.Agarwal, Ms.B.R.Gajjar has cited a recent decision in the case of NARAYANASWAMY RAVISHANKAR Vs. ASSTT. DIRECTORATE OF REVENUE INTELLIGENCE,[decided on 03.10.2002] reported in (2002) 8 SCC 7. This case has been decided by the Hon'ble three Judges of the Hon'ble Supreme Court. In this cited case, 5940 gm of heroin concealed in the bottom of a suitcase alleged to be belonging to the appellant was recovered when he was attempting to transport the same from the International Airport, Chennai to Singapore and in this set of facts, the Hon'ble Supreme Court has held that the "person" of the accused was not searched and, therefore, the provisions of Section 50 of the NDPS Act were not attracted. This decision of Narayanaswamy Ravishankar [Supra] is latest one in point of time compared to the date of decision of Sajan Abraham [Supra]. It is well settled principle of law with regard to precedent that where there are two decisions rendered by the Hon'ble Supreme Court of equal strength of Judges, the judgment which is latest in point of time, should be taken into consideration and respected by the Court. In view of all these discussions made hereinabove, the judgment of the Division Bench of this Court in Criminal Appeal No.12 of 2002 cannot be said to be a judgment per-incurium.

26.4 In view of what is stated hereinabove, the person of the accused was not searched and no article was seized from the person of the accused and, therefore, Section 50 of the N.D.P.S. Act is not attracted in this case. We are not impressed upon the arguments of Mr.R.M.Agarwal that in this case by not informing the accused about existence of right of being searched in presence of a gazetted officer or a Magistrate, Section 50 of the N.D.P.S. Act which is in mandatory nature is not complied with. We, therefore, reject the contention with respect to Section 50 of the N.D.P.S. Act.

27. Now this takes us to the fifth contention taken by Mr.Agarwal with regard to Section 52 of the N.D.P.S. Act. Mr.Agarwal has argued that in this case, P.W.5 Shri P.M.Jadav did not hand over the seized muddamal articles along with the custody of the accused to the officer incharge of the nearest Police Station and looking to the evidence, he continued to retain the custody of that muddamal articles and the accused and thereby he has contravened Section 52 of the N.D.P.S. Act. Section 52 of the N.D.P.S. Act is not a mandatory section. In case of STATE OF PUNJAB Vs. BALBIR SINGH [Supra], on which Mr.R.M.Agarwal has placed reliance, it has been held as

follows :-

"The provisions of Section 52 and 57 are by themselves not mandatory. These provisions contain certain procedural instructions for strict compliance by the officers. But if there is no strict compliance of any of these instructions that by itself cannot render the acts done by these officers null and void and at the most it may affect the probative value of the evidence regarding arrest or search and in some cases it may invalidate such arrest or search. But such violation by itself does not invalidate the trial or the conviction if otherwise there is sufficient material. Therefore, it has to be shown that such non-compliance has caused prejudice and resulted in failure of justice. The officers, however, cannot totally ignore these provisions and if there is no proper explanation for non-compliance or where the officers totally ignore the provisions then that will definitely have an adverse effect on the prosecution case and the courts have to appreciate the evidence and the merits of the case bearing these aspects in view."

27.1 As discussed earlier, all the officers of the Police Department of and above the rank of police Inspector are empowered under Section 41(2) of the N.D.P.S. Act by Notification dated 15th June, 1985 [Supra]. By another Notification dated 15th June, 1985, an officer, in charge of a Police Station within the limit of their respective jurisdiction were invested with the powers under Section 53(2) of the N.D.P.S. Act for the investigation of an offence, under the said Act. The prosecution has produced a Notification issued under Section 2(s) of Cr.P.C. by the Government of Gujarat, at Ex.38. As per column No.2 of this Notification, the C.I.D., Gandhinagar, Ahmedabad is declared to be a Police Station and the areas of Ahmedabad City and Ahmedabad Rural are included in the said Police Station. P.W.5 Shri P.M.Jadav is an officer of the said Police Station and as per the Notification dated 15th June, 1985 all the police officers of and above the rank of the Police Sub-Inspector can become an officer in charge, of a particular Police Station. Hence, P.W.5 Shri P.M.Jadav was invested by the State Government with the powers of an officer in charge, of the Police Station, in view of Section 53 of the N.D.P.S. Act and, therefore, in view

of Section 52(3)(b), he was empowered under Section 53 of the N.D.P.S. Act and, therefore, there is nothing wrong if such officer empowered under Section 53(2) of the N.D.P.S. Act retains the custody of muddamal articles as well as accused with him and, therefore, Section 52 of the N.D.P.S. Act was fully complied with. In case of ASLAMBHAI IBRAHIMBHAI MEMON AND ANOTHER Vs. THE STATE OF GUJARAT, which is relied on by Ms.Gajjar reported in 1990 Cri.L.J. 1787, in para 3.6 it has been held as follows:-

"3.6 It is also submitted by Mr.Saiyed that there is a breach of sub-sec.(4) of Sec.52 inasmuch as the officer to whom the article is forwarded has not taken measures for disposal according to law. It may be stated that, here the Investigating Officer is Shri Desai himself, who has seized the article and arrested the accused. He is the officer empowered to investigate under Sec.53 of the Act. When that is so, sub-sec. (4) thereof would not be applicable inasmuch as it would apply only in those cases in which the person, other than the person who is empowered to investigate, has seized the article or arrested the person and has forwarded to the person who is in charge of the Police Officer empowered under Sec.53. Apart from that, it is clear in this case that the muddamal was immediately within five days despatched to the Forensic Science Laboratory for its examination. Thereafter, the report has been received. In that view of the matter, it cannot be said that sub-sec. (4) of Sec.52 is not complied with."

27.2 Learned APP Ms.Gajjar, in reply to contention of Mr.Agarwal, has placed reliance on the case of KARNAIL SINGH Vs. STATE OF RAJASTHAN, reported in (2000) 7 SCC 632. In this case, in para-12, it has been held that as follows :-

"With the application of Section 51 read with Sections 52 and 53 of the Act, the officer required to affix the seal etc., under Section 55 of the Act, would be "the officer in charge of the nearest police station" as distinguishable from an officer in charge of a police station empowered under Section 53 of the Act. If resort is had to the procedure prescribed under sub-section (3)(a) of Section 52, the applicability of Section 55 of the Act would be attracted but if the arrested person and the

> seized articles are forwarded under clause (b) of sub-section (3) of Section 52 of the Act to the officer empowered under Section 53 of the Act, the compliance of Section 55 cannot be insisted upon. The distinction between the officer in charge of the nearest police station and the officer empowered under Section 53 of the Act is distinct and clear. The distinction is apparently based upon a reasonable object, because in case the person and the seized articles are referred to the "officer in charge of the nearest police station", a distinct agency, then the "officers contemplated under Section 53" of the Act comes into the picture which requires the taking of sufficient safeguards to protect the seized property in the interests of the arrested persons. The distinction is also evident from Section 52-A(2) of the Act. Keeping in view the multifarious activities and the duties cast upon the officer in charge of the police station under the code of Criminal Procedure and he being apparently busy with the duties under the code, the officers mentioned in Section 53 of the Act have been mandated to take action for disposal of the seized narcotic drugs and psychotropic substances by filing an application which, when filed, has to be allowed by the Magistrate as soon as may be."

Under these circumstances, P.W.5 Shri P.M.Jadav is an officer empowered under Section 53 of the N.D.P.S. Act by the State Government in exercise of the powers under Section 52(3)(b) of the N.D.P.S. Act. He retained custody of muddamal articles and the accused with him and thus, in view of evidence on record, we hold that there is no breach of Section 53 of the N.D.P.S. Act.

28. Here in this case, P.W.5 Shri P.M.Jadav had recovered and seized the muddamal articles, which were found from the gunny hand bag carried by the accused. That articles were seized under the panchnama Ex.25 during the period from 16.40 hours to 17.45 hours. The accused was arrested at 17.45 hours. The complainant, immediately, thereafter, lodged his complaint in the police station at 19.20 hours on the same day i.e. on 25.09.1996. Looking to this time of registering the complaint, it was not feasible for P.W.5 Shri P.M.Jadav to send the muddamal articles to F.S.L. on that very day during the night time. P.W.5 Shri P.M.Jadav prepared a forwarding letter at Ex.18 on 25.09.1996 and that

forwarding letter was submitted to his superior officer and that superior officer i.e. Deputy Superintendent of Police by putting his endorsement in the form of letter forwarded the same to the F.S.L. As per receipt Ex.19, that muddamal article was received by the Deputy Director of F.S.L. on 26.09.1996 i.e. on the next date. The report of F.S.L. is produced at Ex.20, wherein it is stated that two sealed parcels bearing Marks A/1 and B/1 tied with the string with a seal of P.I., N.D.P.S., C.I.D., Crime, G.S., Ahmedabad were received by the officer of F.S.L. and below a seal affixed on that two parcels, paper slips were found bearing signatures of panch witnesses. Thus, there is no delay on the part of P.W.5 Shri P.M.Jadav to send the muddamal article to F.S.L. and the responsible officer of F.S.L. had received that two sealed parcels in intact condition and below that each seal, the slip bearing signatures of panch witnesses was found pasted and, therefore, there is no slightest remote chance of articles being tampered with during the period in which the articles remained with P.W.5 Shri P.M.Jadav till they were received by the responsible officer of F.S.L. and, therefore, there is no substance in the arguments of Mr.Agarwal that Section 52 of the N.D.P.S. is not complied with. Hence, arguments on point of Section 52 of the N.D.P.S. Act are devoid of merits. Therefore, they are rejected.

29. Then this takes us to sixth contention of Mr.R.M.Agarwal that provisions of Section 55 of N.D.P.S. Act are not complied with. As discussed earlier, when P.W.5 Shri P.M.Jadav was an officer empowered under Section 53 of the N.D.P.S. Act, he was not required to deliver the muddamal articles, to officer in charge of the police station and, therefore, Section 55 of the N.D.P.S. Act is not applicable to the facts and circumstances of this case, in view of the decision of Karnail Singh [Supra].

30. Now this takes us to seventh contention of Mr.Agarwal that the provisions of Section 57 of the N.D.P.S. Act are not complied with. In case of Balbir Singh [Supra] on which, Mr.Agarwal has placed reliance, it has been held in conclusion (6) of para-25 as follows:-

> "The provisions of Sections 52 and 57 which deal with the steps to be taken by the officers after making arrest or seizure under Sections 41 and 44 are by themselves not mandatory. If there is non-compliance or if there are lapses like delay etc. then the same has to be examined to see

whether any prejudice has been caused to the accused and such failure will have a bearing on the appreciation of evidence regarding arrest or seizure as well as on merits of the case."

Section 57 of the N.D.P.S. Act read as follows-

"57. Report of arrest and seizure - Whenever any person makes any arrest or seizure under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior."

As per Section 57 of the N.D.P.S. Act, P.W.5 Shri P.M.Jadav was required to send his report with regard to arrest and seizure to his immediate superior officer within 48 hours. We have examined the record and proceedings of the case consisting of File No.1, File No.2 and File No.3. In file No.2 at page-81, there is an original report of P.W.5 addressed to the Chief Metropolitan Magistrate by which a request was made to grant police custody of accused for five days and along with this report [pages-81 and 82], copy of case diary was sent. In the cross-examination of P.W.5 Shri Jadav in para-2 a suggestion was put and which was denied that after completion of raid, no information was sent to his superior officer about the said raid. In the case of Sajan Abraham [Supra] on which reliance has been placed by Mr.R.M.Agarwal, it has been held as follows :-

"It is true that the communication to the immediate superior has not been made in the form of a report, but we find, which is also recorded by the High Court that PW 5 has sent copies of FIR and other documents to his superior officer which is not in dispute..... This constitutes substantial compliance and mere absence of any such report cannot be said it has prejudiced the accused....."

30.1 As stated earlier, there is a note on page-73 being page of case diary in file No.2 of the Record and Proceedings of the case, to the effect that report under Section 157 of Cr.P.C. was sent. It may be noted that the I.O. has to prepare a case diary as and when the investigation proceeds day to day and it is a matter of general knowledge that I.O. has to send a copy of this case diary of each day to his superior officer, immediately, on the next date. The case diary dated 29.09.1996 speaks about the entire complaint containing

the facts with regard to search, seizure and arrest of the accused and, therefore, from the evidence on record, it appears that report under Section 57 of the N.D.P.S. Act was made to superior officer.

30.2 There is no specific separate report on the record to show that Section 57 of the N.D.P.S. Act was complied with, but when officer, who conducted raid for search, seizure and arrest has deposed that he had informed his superior officer about the search, seizure and arrest of the accused under Section 57 of the N.D.P.S. Act, there is no reason to disbelieve that version of P.W.5 Shri P.M.Jadav. In case of Narayanaswamy Ravishankar [Supra], it has been held that with regard to alleged non-compliance of Section 57 of the NDPS Act, the High Court has rightly noted that PW3 has stated that the arrest of the accused was revealed to his immediate superior officer, namely, the Deputy Director and therefore, in absence of specific report under Section 57 of the N.D.P.S. Act, it was held that there was compliance with the provisions of Section 57 of the N.D.P.S. Act. The written report is not necessary, hence, this contention for non-compliance of Section 57 of the N.D.P.S. Act is also rejected.

31. Mr.R.M.Agarwal has by taking aid of Section 51 of the N.D.P.S. Act taken eighth contention that Section 102(3) of Cr.P.C. is not complied with and, therefore, the conviction is bad in law. In support of his arguments, he has placed reliance on the decision in the case of SHIVABHAI GAJMALBHAI Vs. STATE OF GUJARAT, reported in 1996 (2), 37(2) G.L.R. 64. Section 102(3) of Cr.P.C. reads as follows :-

> "Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same."

Section 102(3) of Cr.P.C. requires that the officer has to make a report with regard to seizure to the concerned Magistrate having jurisdiction.

In case of State of Punjab Vs. Baldev Singh

[Supra], on which Mr.R.M.Agarwal has placed reliance, it has been observed in para-14 as follows :-

"In Balbir Singh case [reported in 1994 (3) SCC 299], after referring to a number of judgments, the Bench opined that failure to comply with the provisions of CrPC in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view."

Here in this case, as discussed earlier, the accused was arrested at 19.20 hours on 25.09.1996. He was produced before the Chief Metropolitan Magistrate on 3.30 hours on 26.09.1996 together with a separate report seeking police remand for ten days. That report is at page-63 in file No.2 of record and proceedings of the case. This report is addressed to the Chief Metropolitan Magistrate, Ahmedabad. As per Section 102(3) of Cr.P.C., the report with regard to seizure of muddamal article is required to be made to the Magistrate. In this report at page-63 in file No.2, P.W. 5 Shri P.M.Jadav had made a detailed report with regard to muddamal articles. It may be noted that even a copy of case diary was sent to the Magistrate and in this case diary also, there is mention about seizure of muddamal articles. Therefore, there is full compliance of Section 102(3) of Cr.P.C. in this case. Mr.R.M.Agarwal has not explained this Court as to how the accused has been prejudiced, if it is held that Sections 52, 55 and 57 of the N.D.P.S. Act and Section 102(3) of Cr.P.C. are not complied with. From the record, it appears that the aforesaid sections are fully complied with by P.W.5 Shri P.M.Jadav.

32. The nineth contention of Mr.Agarwal is to the effect that the prosecution has failed to prove that article, which was recovered and seized from the accused, was an opium. He has placed reliance on the case of ALIHUSEN NAJARALI Vs. THE STATE OF GUJARAT, reported in 1974 CRI. L.J. 524. This case is under the Bombay Prohibition Act. Relevant section defining "opium" in the Bombay Prohibition Act is totally different and distinct from section defining opium in the N.D.P.S. Act. In this cited case, on reading para-3, we find that Assistant Chemical Examiner, who analysed sample, was

examined by the prosecution and he had admitted that he has analysed the substance only to find out the percentage of morphine. Here in this case, the facts are totally different. The prosecution had produced in all eleven documents with the list at Ex.12 in the trial Court. Mark 12/11 was a report of F.S.L. together with forwarding letter. The accused was represented by his advocate Shri J.R. Dave. There is an endorsement of Shri J.R.Dave in the margin of list Ex.12. That endorsement is to the effect that he [Shri J.R.Dave] has no objection if (documents) at Sr.Nos.9, 10, 11 are exhibited. On the strength of above endorsement, Mark 12/11 was exhibited as Ex.20. Ex.20 is a report of F.S.L. Even otherwise, this report at Ex.20, is admissible in evidence in view of Section 293 of Cr.P.C. This report Ex.20 was produced by the prosecution as per Section 294 of Cr.P.C. read with para-161 of the Criminal Manual. Section 294 speaks that if pleader of the accused admits the document produced with the list then formal proof of such document is not necessary and this document and such admitted document can be read in evidence in any inquiry, trial or other proceedings under this Code without proof of person of signature to whom it purports should be signed. On reading Ex.20, we find that scientific officer of F.S.L. had carried out physical examination, botanical examination and chemical examination of the articles sent by P.W.5 Shri P.M.Jadav and after carrying out the tests in detail, the scientific officer of F.S.L. had come to a conclusion that the said substance was an opium. Therefore, the authorities cited by Mr.R.M.Agarwal are not at all applicable to the facts and circumstances of this case. The prosecution has ably proved that the substance, which was found from the custody of the accused, was nothing but an opium and, therefore, this contention with regard to non-proving the substance as opium is also negatived by us.

33. Mr.R.M.Agarwal has by taking tenth contention, argued that the learned Judge of the trial Court has put only five questions in further statement of the accused, recorded under Section 313 of Cr.P.C. He has further argued that the circumstances appearing in question Nos.2, 3 and 4 were brought to the notice of accused and, therefore, no other circumstances can be taken into consideration, while deciding the case. Section 313 of Cr.P.C. enjoins on the Judge of the trial Court to bring to the notice of the accused, the circumstances appearing in the evidence which are against him. Here in this case, whatever circumstances appeared against the accused were brought to the notice of the accused and accused has

replied to questions put for that circumstances. It is not necessary for the learned Judge of the trial Court to put question arising from every word or every sentence or every line of the evidence of the prosecution witnesses. Only that circumstances which are appearing against the accused are required to bring to the notice of and explained to the accused and the accused was required to answer to that questions only. The relevant section of further statement was Section 342 in Cr.P.C., 1898 (Section 313 of Cr.P.C., 1973). In the case of STATE Vs. KACHARA, reported in A.I.R. 1961 Guj. 20, it has been held that "it is not necessary that important parts of the entire evidence given by a witness should be put to the accused in his examination under Section 342. Only the portions of the evidence on which the accused can give explanation should be put to him in examination. If a prosecution witness has not given evidence of incriminating circumstances requiring explanations portions of the evidence of such evidence need not be put to the accused." and, therefore, whatever incriminating circumstances appeared in the evidence of the witnesses were brought to the notice of and explained to the accused and he had replied to that questions. The submission that merely because questions based on other evidence were not asked, that circumstances, cannot be taken into consideration, is not a legal submission in consonance with Section 313 of Cr.P.C. and, therefore, this contention of Mr.Agarwal touching further statement under Section 313 of Cr.P.C. is also negatived.

34. Mr.R.M.Agarwal has by taking eleventh contention, argued that immediately after the stage of Section 232 of Cr.P.C., the accused was not called upon to enter on his defence and adduce evidence, he might have in support thereof and, therefore, the procedure adopted by the learned Judge of the trial Court was not legal and correct and, therefore, the benefit which the accused ought to have been given under Section 233 of Cr.P.C. is denied and, therefore, the conviction based on such illegal procedure adopted, is contrary to law and hence, the same is required to be set aside. In support of his submissions, he has relied upon the decision in the case of ALI Vs. STATE OF KERALA, reported in 2001 (4) Crimes 166.

34.1 As per 36-A of the N.D.P.S. Act, offences punishable under the N.D.P.S. Act are triable by the Special Court. As per Section 36(3) of the N.D.P.S. Act, an Additional Sessions Judge can preside over, the Special Court constituted under Section 36(1) of the N.D.P.S. Act. As per Section 36-C of the N.D.P.S. Act,

the special Court is deemed to be a Court of Sessions and all the provisions of Cr.P.C. shall apply for proceedings before a special Court, meaning thereby the provisions of Chapter - 18 of Cr.P.C. are applicable to the cases under the provisions of the N.D.P.S. Act, as if they are sessions cases. After framing the charge, if the accused pleads not guilty to the charge, the prosecution is required to lead evidence under Section 231 of Cr.P.C. and immediately, after recording evidence of the prosecution, if as per Section 232 of Cr.P.C., court finds that there is "no evidence" against the accused then in that case, he may acquit the accused, even without calling upon the accused to enter on his defence and ask him to adduce evidence his defence. Section 232 of Cr.P.C. contemplates three clear stages for the application [i] the entire evidence for the prosecution must have been taken; [ii] the accused must then be examined under Section 313 ; and [iii] the prosecution and the defence must have, thereafter, been heard.

Here in this case, after recording further statement under Section 313 of Cr.P.C., the accused was called upon to enter on his defence. The court has not passed any specific order of acquittal under Section 232 of Cr.P.C. The words "no evidence" used in Section 232 suggest that in the absence of evidence on the prosecution side, accused can be acquitted under this Section 232 of Cr.P.C. The words "no evidence" suggest that the Judge has to consider whether there is legal evidence connecting the accused with the commission of the crime and not its quality and quantity. Here in this case, the learned Judge of the trial Court has not passed any order under Section 232 of Cr.P.C. It appears that he has proceeded further as per the stage of Section 234 of Cr.P.C. and after making compliance of Section 234 of Cr.P.C., the learned Judge of the trial Court has rendered the judgment under Section 235 of Cr.P.C. meaning thereby he has not passed any specific order under Section 232 of Cr.P.C., but the fact remains that the accused was called upon to examine the witness on his side as defence witness. The accused understood the answer of the question No.5 and straightway filed his written reply, which is at Ex.42. The accused was represented by his advocate and with the assistance of his advocate, he submitted his written reply Ex.42 wherein he has not stated anything about his intention to examine any person or himself as defence witness and, therefore, merely because the learned Judge of the trial Court has not complied with Section 232 of Cr.P.C. by not acquitting the accused at the stage just immediately,

before Section 233 of Cr.P.C. no illegality is committed by the learned Judge of the trial Court because opportunity of being heard was given by asking him as to whether he wanted to examine any witness. He replied that question by filing written reply Ex.42 wherein he did not say that he wants to examine his witness in his defence. No prejudice has been caused to the accused in the Sessions Court. Generally, the Presiding Judge of the Sessions Court, after reaching to the stage of Section 231 of Cr.P.C., immediately, after examining prosecution witnesses records further statement under Section 313 of Cr.P.C. and in that further statement, the accused is asked as to whether he wants to examine any witness in his defence or not. To see that Section 233 of Cr.P.C. is complied with and after making compliance of Section 233 of Cr.P.C. if accused examines any witness in his defence then in that case trial reaches to the stage of Section 234 of Cr.P.C. and thereafter, the judgment is being delivered under Section 235 of Cr.P.C. and, therefore, looking to a long standing practice of not complying with Section 232 of Cr.P.C., in this case, non-compliance of Section 232 will not affect the conduct of the trial of the case. The provisions of Cr.P.C. are made with a view to see that the principles of natural justice are followed by the Court by giving full opportunity of being heard to the accused. Here in this case, after the stage of Section 231 of Cr.P.C. accused was asked question No.5 as to whether he wanted to examine witness or not and the accused kept mum and did not give any answer, and he filed written rely Ex.42. Under these circumstances, the contention taken by Mr.Agarwal with regard to non-compliance of Section 233 of Cr.P.C. is devoid of merits and the same is rejected.

35. The twelveth contention of Mr.R.M.Agarwal is to the effect that as per the case of the prosecution P.W.5 Shri P.M.Jadav had taken sample of 50 grams from each of two boxes and it is consistent case of the prosecution that whatever sample was taken from the said two boxes found in possession of accused, was sent to F.S.L. He has drawn our attention to third page of report Ex.20 of F.S.L. which is at page-191 in the paper-book. As per the entries made on this third page of Ex.20, as argued by Mr.Agarwal the sample which was marked as Mark A/1 was found containing a substance weighting 54.500 grams, while the sample which was marked as Mark B/1 was found containing the substance weighing 48.800 grams. By showing this discrepancy in the weight of each sample, he has argued that there were all chances of tempering with the samples which were sent to F.S.L. As per page-3 of

Ex.20, each sample containing substance was weighed and the weight includes the weight of plastic bag and, therefore, for sample marked as Mark-A/1, the prosecution has explained that this weight of 54.500 grams is including the weight of plastic bag and, therefore, there cannot be any doubt. As against this, Mr.Agarwal has argued that if this argument is accepted then in no case weight of substance in sample marked B/1 can be less than 50 grams, if really that weight includes the weight of plastic bag.

35.1 We have considered the evidence as a whole. The substance, which was found from two boxes, was a thick semi fluid (juice type) substance and, therefore, it is quite possible that while, taking the substance of 50 grams from the box that substance might have stuck with the plastic bag from inner side. Possibly looking to the facts of the case and nature and physical condition of substance and state of affairs there can be a little shortage of weight of 1.2 gram which is negligible shortage. This evidence is considered by taking into consideration the endorsement of the officer of F.S.L. on second page of Ex.20. It is stated that Mark A/1 and B/1 were sealed parcels wrapped in paper and tied with string and the officer of F.S.L. found that there was a seal of P.I., N.D.P.S., CID, Crime, G.S., Ahmedabad [written in English] and this seal was affixed on red wax seal. It is also stated that at the bottom of page-3 of Ex.20 that a paper slip was found from beneath the seal of each parcel and each paper slip was bearing signatures of [1] Babubhai Mohanbhai Patani; and [2] Indrajit Nagjibhai Rajput, which were admitted by the panch witnesses and, therefore, when P.W.5 Shri P.M.Jadav has categorically deposed in his evidence that the muddamal article remained in his custody, after the arrest of the accused meaning thereby he did not hand over the muddamal article to any one. It is worth to make a note that P.W.5 Shri P.M.Jadav kept muddamal articles in his custody in view of Section 52(3)(b) of N.D.P.S. Act particularly when he was invested with the powers under Section 53 of the N.D.P.S. Act. He prepared forwarding letter Ex.18 on that very day and on the next day, the officer of F.S.L. received that parcel of muddamal articles with seals in "intact" condition and, therefore, we are of the view that this negligible shortage of weight in sample Mark B/2 makes no matter and the apprehension shown by Mr.Agarwal is not worth consideration and, therefore, this contention is rejected.

36. Mr.R.M.Agarwal has taken thirteenth contention

that P.W.5 Shri P.M. Jadav is an officer, who received a secret information and on the basis of that secret information, he carried out the raid and on successfully carrying out the raid, thereafter, he lodged a complaint against the accused and subsequently, he filed a charge-shet on completion of investigation and, therefore, P.W. Shri P.M.Jadav is an interested officer to see that any how the accused is convicted to get the credit from the department.

There is no provision in N.D.P.C. Act that the officer, who receives a secret information and carries out raid on the basis of such information cannot file the complaint against the offender or he cannot investigate the case. Looking to the nature of the case, an officer who receives a secret information is supposed to carry out the raid at the earliest without making any delay and if he is successful in carrying out the raid and finds that the offender is keeping a contraband article with him then it makes a duty for him to lodge the complaint. In this type of case, after lodging the complaint practically no further investigation is required to be carried out after lodging the complaint. That officer invested with the powers under Section 53 of the N.D.P.S. Act has to send muddamal article to F.S.L. and on receipt of report, he has to file a charge-sheet against the accused if it is reported by F.S.L. that substance is a contraband article. Therefore, we are of the considered view that merely because, P.W.5 Shri P.M.Jadav had received a secret information and he carried out the raid and he lodged the complaint, he cannot investigate the case, cannot be said to be a correct proposition of law. He has investigated the case in exercise of the powers conferred upon him under the provisions of Section 53 of the N.D.P.S. Act as well as under the provisions of Cr.P.C. and, therefore, nothing is wrong if the same person, who lodged the complaint has filed a charge-sheet. In view of this, this contention is also devoid of merits and, hence, it is rejected.

37. Mr.R.M.Agarwal has then by taking fourteenth contention, argued that there is no documentary evidence in any form to prove the journey right from stage of seizure of muddamal articles to stage of reaching of that articles to F.S.L. He has also argued that the seal used for sealing the samples had remained in possession of the Investigating Officer, through out. He has further argued that P.W.5 Shri P.M. Jadav has not deposed as to on what particular day, he sent the muddamal article to the Court. As per notification Ex.38, Office of Superintendent of Police, C.I.D. Crime, Gandhinagar

Zone, Ahmedabad is declared to be a police station and the jurisdiction of area of this police station includes Ahmedabad City as well as Ahmedabad Rural. As per notification dated 15th June, 1985, which is extracted in the earlier part of the judgment, P.W.5 Shri P.M. Jadav, being Police Officer of and above the rank of the Sub-Inspector was invested with powers under Section 53 of the N.D.P.S. Act. When he was invested with the powers under Section 53 of the N.D.P.S. Act, he was invested with the powers equivalent to the powers of the in-charge officer of the Police Station for the offence under the provision of N.D.P.S. Act and, therefore, in view of Section 52(3)(b) of the N.D.P.S. Act, he being an officer empowered under Section 53 of the N.D.P.S. Act, was not required to hand over the muddamal article to P.S.O. of the said police station as required under Section 55 of the N.D.P.S. Act and, therefore, the samples as well as seal had remained with him in his capacity of officer in charge of the police station for the purpose of investigation and, therefore, there is nothing wrong if he had retained the seal with him and the samples were sent to F.S.L. Again at the cost of repetition, it is required to place on record that muddamal articles were sent to his immediate superior officer on the very next day along with a forwarding letter, Ex.18. The immediate superior officer put his certificate below Ex.18 and on 26.09.1996, the samples were sent to F.S.L. and as per receipt Ex.19, the officer of F.S.L. received two boxes in sealed condition on 26.09.1996 and, therefore, there is no delay whatsoever. The prosecution has ably proved each stage of journey right from seizure of the articles to the stage of receiving the sample articles by the officer of F.S.L. The prosecution has examined P.W.3 Police Constable Shri Kishanrao, who carried the sample from the office of D.C.P. of State Narcotic Squad, Gujarat State, Ahmedabad to F.S.L. and handed over the muddamal articles in the same condition to officer of F.S.L. on 29.09.1996. We are not much impressed upon by this type of contention when satisfactory documentary evidence is there on the record to satisfy this Court that there was no slightest remote possibility of samples being tempered with. Hence, this fourteenth contention is straightway rejected.

38. It is argued by Mr.R.M.Agarwal by taking fifteenth contention that P.W.5 Shri P.M. Jadav has not deposed that as to when he sent the muddamal articles to the Court. There cannot be any dispute that the sample of muddamal articles were received by the officer of F.S.L. on 26.09.1996 vide Ex.19. The report of F.S.L.

Ex.20 was prepared on 19.12.1996. It is stated in letter that P.S.I. of Anti Narcotic Squad should collect the residual of muddamal articles from the F.S.L. It must have been received by the officer of the Narcotic Cell on 20.12.1996. From the record, it appears that, the Investigating Officer filed a charge-sheet in the Special Court on 21.12.1996. Vertical column No.3 of charge-sheet speaks that the charge-sheet was filed along with muddamal articles for which a muddamal pavti is produced and, therefore, there is no delay in producing that muddamal articles along with the charge-sheet in the Court and, therefore, this argument lacks of merits and hence, it is outright rejected.

39. Mr.R.M.Agarwal has by taking sixteenth contention, argued that the prosecution has not proved the documents namely Exhs. 23 to 37 in accordance with the provisions of Indian Evidence Act. He has argued that the prosecution ought to have examined the persons, who wrote the documents. He has further argued that it is not enough for the prosecution to examine P.W.5 Shri P.M.Jadav in whose presence the documents were prepared and, therefore, all these documents cannot be looked into and considered by this Court. In short, the submission of Mr.Agarwal is that all these documents are not strictly proved as required to be proved in view of the provisions of the Indian Evidence Act. On this point, he has placed reliance on decision in the case of MER VAJA MERAMAN Vs. STATE OF GUJARAT, reported in 1988 (2) G.L.R. 1057. He has also argued that when panch witnesses have turned hostile to the prosecution, panchnama cannot be looked into. There are more than one method to prove the documents. In case of G. GOPAL REDDY Vs. STATE OF ANDRA PRADESH, reported in Judgement Today 1996 (6) S.C. 268 = A.I.R. 1996 S.C. 2184, the Hon'ble Supreme Court has laid down the legal proposition as to by which modes of proof, documents can be proved. It seems that Mr.Agarwal lost sight of the provisions contained in explanation of Section 47 of the Indian Evidence Act. As per Section 47 of the Indian Evidence Act, a document can be said to have been proved if a person by whom any document was written or signed, is examined or by examining, any person acquainted with the handwriting of the person by whom it is supposed to be written or signed. Explanation to Section 47 makes it clear that the person is acquainted with the hand writing of another person when he has seen that person write, or when he has received documents purporting to be written by that person, in answer to documents written by person himself or under his authority and answered to that person.

In view of this, it is not the only mode to prove a document by examining a person who wrote that document. Herein this case, P.W.5 Shri P.M.Jadav has deposed for the aforesaid documents that the documents were prepared by his subordinate police head constable in his presence and when he has deposed that their contents are true and correct, then to our mind, the documents are duly proved and they are correctly exhibited by the learned Judge of the trial Court and, therefore, this contention appears to have been taken for the sake of taking by Mr.Agarwal.

40. Mr.R.M.Agarwal has by taking seventeenth contention, argued that in this case, the prosecution has not examined the important police witness, who had gone to call the panch witnesses and at whose instance, the panch witnesses had come first to the police station and, thereafter, they accompanied P.W.5 Shri P.M.Jadav. When panch witnesses have deposed that they were called at police station and they came to police station, it is not necessary to examine the police officer, who went to that panch witnesses to call them at Police Station. If the fact in dispute is to the effect that the panch witnesses did not go to the police station, then it can be argued that the police officer, who called the panch witnesses is necessary to be examined. Thus, this contention is having no merits.

41. Mr.Agarwal has drawn our attention to a document Ex.30. He has by taking eighteenth contention, argued that this document appears to have been prepared on 25.09.1996 and it appears to have been sent by P.W.5 Shri P.M. Jadav to P.S.O. of the police station. He has further drawn our attention to an entry with regard to accused No.2 Laherilal Roshanlal for which it is written that he was arrested on 15.00 hours on 29.09.1996. He has argued that if this document Ex.30 was prepared on 26.09.1996 there cannot be an entry with regard to accused No.2, who was arrested at 15.00 hours on 29.09.1996 in Ex.30 and, therefore, this document was, subsequently, prepared and it is fabricated document and, therefore, no reliance can be placed on such type of fabricated document.

41.1 P.W.5 Shri P.M. Jadav, Ex.22 has deposed that mark 12/8 i.e. Ex.30, which is a report with regard to disclosure of offence was prepared by the head constable Shri Hirabhai and it bears his signature and contents are correct. He has also admitted in his evidence that he has subsequently made a note with regard to arrest of the accused No.2 in such report at Ex.30. P.W.5 Shri P.M.

Jadav was an empowered officer under Section 53 of the N.D.P.S. Act and, therefore, he was having exactly similar powers of the P.S.O. of the police station. He can retain the document Ex.30 addressed to P.S.O. He has admitted that he has made an entry with regard to arrest of accused No.2 subsequently. For a moment, if it is believed that this entry with regard to arrest of accused No.2 was made subsequently in Ex.30 then at the best, for the accused No.2, it can be disbelieved but by mere that entry in respect of accused No.2, in Ex.30 case against accused No.1 cannot be disbelieved. Therefore, this contention is also liable to be rejected and accordingly it is rejected.

42. Mr.R.M.Agarwal has, by taking ninteeth contentin, challenged the order of sentence that though charge was framed against the accused for the offence punishable under Sections 17 and 18 of the N.D.P.S. Act and though the learned Judge of the trial Court, while passing an order of conviction, convicted the accused under Section 235 of Cr.P.C. for the offences punishable under Sections 17 and 18 of the N.D.P.S. Act, the learned Judge of the trial Court has inflicted the sentence of only in one set for ten years rigorous imprisonment and fine of Rs.1,00,000-00 and in default of payment of fine to undergo further rigorous imprisonment for one year. Mr.Agarwal has argued that looking to this fact, though accused has been convicted for two offences only one sentence is inflicted and, therefore, it can be said that the learned Judge of the trial Court did not apply her mind when she inflicted the aforesaid sentence. Section 17 of the N.D.P.S. Act is with regard to contravention in relation to "prepared opium". Section 17 of the N.D.P.S. Act prohibits the person from possessing a prepared opium and for this contravention of Section 17 minimum sentence of ten years is prescribed. Section 18 of the N.D.P.S. Act is in relation to opium poppy and opium. Section 18 of the N.D.P.S. Act prohibits a person from possessing opium poppy or opium. On reading Sections 17 and 18 of the N.D.P.S. Act, it is clear that Section 17 of the N.D.P.S. Act is only for recovery of "prepared opium", while Section 18 of the N.D.P.S. Act is for a simple opium. In an Exhaustive Commentary on the N.D.P.S. Act & Rules [First Edition of 2002] Writer N.K. Rastogi has observed on page-202 as follows :-

"7. Charge wrongly framed under Sec.17 causes no prejudice - It is clear that the appellant was well aware of the fact that he had been challenged for the recovery of 36 kgs. of opium

and the charge was also framed for the said recovery of 36 kgs. of opium. It is correct that for the recovery of the opium, a person can be charged and convicted under Sec.18 of the NDPS Act and it is only for the recovery of prepared opium that a person can be charged and convicted under Sec.17 of the Act but once the appellant was aware that he has been challenged and charge sheeted for the recovery of 36 kgs. of opium, no prejudice has been caused to the appellant simply because in the charge sheet, the section was mentioned as Sec.17 instead of Sec.18 of the NDPS Act or in the judgment the conviction has been shown under Sec.17 instead of Sec.18 of the Act. It may also be relevant to point out here that both under Secs. 17 and 18 of the NDPS Act, the punishment provided is the same. Thus there was no miscarriage of justice.

43. Mr.R.M.Agarwal has, by taking twentith contententino, contended that in this case, two independent panch witnesses have not supported the case of the prosecution and the prosecution has placed reliance on the evidence of police witnesses only. He has argued that they are interested witnesses and, therefore, in absence of corroboration from the independent witnesses, their testimonies should be doubted with suspicion and in view of this matter, case is not proved beyond the reasonable doubt. As per his arguments, evidence of Police Witnesses cannot be made sole basis for conviction.

43.1 The main thrust of the arguments of Mr.Agarwal is that in absence of evidence of independent witnesses, police witnesses should be disbelieved and the case should end in acquittal. It is well settled principle of law that the evidence of police officer cannot be under estimated merely because they are the police officers. The evidence of police officer stands on the same flooring as that of any other witness. The evidence of witness cannot be rejected merely because he is poor or a police official. There is no presumption that the police officers are liars. The evidence of witnesses cannot be judged on the basis of their being officials and non-officials. Simply because they are officers, they cannot be said that they are interested or uninterested. The merits of the evidence is to be considered and not the persons who come to depose. The credibility of public officers should not be doubted on mere suspicion and without acceptable evidence. The evidence of an official witness has to be weighed in the same scale as

any other testimony. In the case of RAM KUMAR Vs. STATE (NCT) OF DELHI, reported in AIR 1999 S.C. 2259, it has been held that in absence of any material on record to show that no independent witness was available near the place of incident, the evidence of such Police Officers which was found critical, held could not be discarded, merely on the ground that no independent witness has been examined by the prosecution.

In view of this legal position with regard to police witness, we have carefully examined the evidence of police witnesses in this case. We are satisfied that their evidence is trustworthy, dependable and it inspires confidence. In view of this matter, the arguments of Mr.Agarwal that the police officers are interested witnesses, cannot be accepted and, therefore, that arguments are also rejected.

44. Except the aforesaid contentions, no other contentions are taken by Mr.R.M.Agarwal. We have thoroughly examined the evidence on record and we find that there is no material on record to come to a conclusion that there is infirmity in the judgment of conviction and sentence. The complainant, who had received a secret information, had carried out the raid of the gunny hand bag which was with accused and on search and seizure of the hand bag with the accused the contraband article was found from the actual physical and conscious possession of the accused. The complainant had taken utmost care to see that no provisions in the N.D.P.S Act and Cr.P.C. are contravened.

In view of this discussion made hereinabove, we are satisfied that the complainant, who carried out the search and seizure, had fully complied with Sections 41(2), 50 [though not necessary], 52, 55, 57 of the N.D.P.S. Act and Section 102(3) of Cr.P.C. We are in full agreement with the reasons assigned by the learned Judge of the trial Court to hold the accused guilty for the offences, for which the charge was framed. The reasons assigned by the learned Judge of the trial Court are quite plausible, cogent, convincing and acceptable. Thus, taking over all view of the matter, the evidence on record is sufficient and satisfactory to come to a conclusion that the accused has committed an offence under the provisions of the N.D.P.S. Act. Under these circumstances, this appeal lacks of merits and it deserves to be dismissed.

45. For the foregoing reasons, this appeal deserves to be dismissed and accordingly it is dismissed. The

judgment and order of conviction and sentence, rendered by the learned Additional Sessions Judge, City Civil & Sessions Court, Ahmedabad City, in Sessions Case No.313 of 1996 on 22.09.1997 are hereby confirmed. The order regarding disposal of the Muddamal articles as per terms of directions given by the learned Judge of the trial Court in the operative order of the impugned judgment is maintained.

[A. M. Kapadia, J.]

[H. H. Mehta, J.]

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